THE

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Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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On page 89, line 8, insert *not* between were and "barred"
page 44 line 6 of the marginal note for 'by' insert "through"
page 94, line 13 from the end *for* 133 *read* 113

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

MUSSAMUT NANOMI BABUASIN AND OTHERS . . . . . } PLAINTIFFS;

AND

MODUN MOHUN AND OTHERS . . . . DEFENDANTS.

J. C.*
1885
June 24, 30; *July* 1; *Dec.* 18.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mitakshara and Mithila Law—Execution Sale—Rights of Coparceners—Joint Family Debt.

In an execution sale it appeared that the debt was a joint family debt incurred by *G.*, the head of a joint Mithila family, and that the property sold was the share of the whole family in a certain mouzah:—

Held, that *Deendyal's Case* (1) did not bind the Court to hold that nothing but *G.*'s coparcenery interest passed to the purchasers.

What passes by such a sale depends upon the nature of the debt (*e.g.*, whether or not it is tainted with immorality) and the intention of the parties. The other coparceners not being parties to the sale or the execution proceedings, are entitled to try the fact or the nature of the debt in a suit of their own. The purchaser, if he has bought the entirety, may defend his title on any ground which would have justified the sale.

APPEAL from a decree of the High Court (June 16, 1882) reversing a decision of the Subordinate Judge of *Bhagulpore* (May 14, 1879), and dismissing the suit of the Appellants with costs.

* *Present*:—LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) Law Rep. 4 Ind. Ap. 247.

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The suit was instituted on the 14th of September, 1878, by *Mussamut Nanomi*, on behalf of her minor sons and herself, to set aside a sale in 1872, in execution of a personal decree against *Girdhari Singh*, the father of the minor Plaintiffs and the husband of *Mussamut Nanomi*, at which the Defendant *Hirdey Narain* had become the purchaser, and had, as such, obtained possession not only of the debtor, *Girdhari Singh's*, interest, but also of that of his sons, the minor Plaintiffs, in an 8 annas 11¼ gundahs of a mouzah called *Rampore Bhatkera*.

The Plaintiffs' contention was, that that mouzah was ancestral property, governed by the law of Mithila and Mitakshara, which belonged to the minor Plaintiffs, jointly with their father, and had not been sold in such manner, or under such circumstances, as to bind the Plaintiffs, and that the Defendant, by his purchase, took either nothing at all, or at most only the interest of *Girdhari Singh*, and that in the latter case, the Plaintiffs were entitled to have their shares ascertained by the Court, and restored to them. And in the case of such partition being made, the Plaintiff *Mussamut Nanomi* claimed to be entitled in her own right to one fourth, the other three fourths being divided equally between her sons and the auction purchaser; and the Plaintiffs asked for mesne profits in respect of their due shares for the time of dispossession.

The Defendant *Hirdey Narain* contended that the entire interest in the mouzah in question had been sold so as to bind the Plaintiffs.

The principal question which arose under the numerous issues recorded was of the same character as has been considered by the Judicial Committee in several appeals, and especially those of *Muddun Thakoor* v. *Kantoo Lal* (1); *Deendyal Lal* v *Jugdeep Narain Singh* (2), and *Suraj Bunsi Koer* v. *Sheo Prosad Singh* (3), viz.: under what circumstances are minors who are jointly interested with their father in ancestral immoveable estate, bound by a sale of the joint estate in execution of a decree obtained against the father alone.

The first Court was of opinion that the Defendant purchaser

(1) Law Rep. 1 Ind. Ap. 321. (2) Law Rep. 4 Ind. Ap. 247.
(3) Law Rep. 6 Ind. Ap 88.

was entitled to the share of *Girdhari*, and no more, and that that share was one-half of the whole, under Mithila law, and that the mother, under that law, was entitled to no share, as having had provision made for her by her father-in-law; and accordingly gave the minor Plaintiffs a decree for half of the whole, with mesne profits from the date of decree, and dismissed the suit as to the rest of the claim, refusing mesne profits for the preceding period of dispossession on the ground of the Respondent having had no notice, when he bought, of the Plaintiffs' interest and claim.

The High Court, on appeal and cross-appeal, held that the whole interest of the Plaintiffs, as well as of their father, passed by the sale in execution, and directed the suit to be wholly dismissed.

The facts of the case appear in the following judgments:—

That of the senior Judge of the High Court (*Cunningham* and *Prinsep*, J.J.), after referring to the proceedings which terminated in a decree against *Girdhari*, was as follows:—

"In execution of this decree, and for realising the mesne profits, interest and costs, which by this time amounted to Rs.51,767, an order was passed on the application of Mrs. *Collis*, on the 15th of January, 1872, for delivery of possession to her, and for the attachment and sale of the judgment debtor's property. In applying for sale Mrs. *Collis*' pleader described the property to be sold as 'the share of 8 annas 11¼ gundahs out of the entire 16 annas of the right and interest of the judgment debtor in mouzah *Rampore Bhatkera*, usli with dakhili, recorded &c.' On the 9th of September, 1872, the property was sold for Rs.55,000 to *Hirdey Narain*, the present first Defendant. On the 25th of April, 1873, the Zillah Court of *Bhagulpore*, after reciting the various proceedings in execution of the decree, confirmed the sale. Various objections were raised to the sale on the ground of irregularity: these were disallowed by the original, and subsequently by the High Court. The Privy Council, 19th May 1876, though considering that there had been material irregularity, held that *Girdhari Singh* was estopped by his conduct from raising it. The auction purchaser accordingly was put in possession of the

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property, and his right to it under the auction sale is the question contested in the present suit.

"The Plaintiffs allege that the decree was not so framed as to affect the whole joint estate; that they were not parties, the nature of the claim giving the Plaintiffs no right against the other members of the family; that the auction purchaser purchased only the right and interest of *Girdhari;* that there were material irregularities in the conduct of the sale, resulting in an inadequate price being obtained; that though the Privy Council has found that these irregularities had been condoned by *Girdhari,* the waiver by him does not affect them; that the loan of the Rs.45,000 was not one which *Girdhari* could contract so as to be a binding debt on the joint family; and they pray accordingly either (1) that the auction sale may be set aside, the purchase-money with interest being refunded to the purchaser, and an account being taken of the mesne profits of the estates during his possession; or (2) that it may be declared that the auction sale passed to the purchaser merely the interest of *Girdhari Lal,* and that Plaintiffs are, accordingly, entitled to possession subject to any rights the purchaser may have of enforcing partition; and (3) that if the Court decide that the Plaintiffs' share is to be ascertained in the present suit, the necessary parties may be joined, and a due account of mesne profits may be taken.

"On behalf of the first Defendant, it is contended (1) that the property became self-acquired owing to the distribution by *Kirat Singh;* (2) that in any case the auction sale passed to the purchaser the entire interest possessed by *Girdhari Singh* and his joint family in the property in question; (3) that it is not now open to the sons to contest the alienation either wholly or in part.

"The original Court has found:

"(1.) The property was ancestral, and did not become self-acquired in consequence of *Kirat Singh's* deed of gift to his sons.

"(2.) That the irregularities of the auction sale do not entitle the Plaintiff to have it set aside.

"(3.) That the share of *Girdhari* in the joint estate could be sold in execution of decree against him.

"(4.) That only the interest of *Girdhari* in the joint estate passed by the execution sale to the first Defendant.

"(5.) That no notice at the time of sale was given of the minors' claim, that there was good faith on the part of the Defendant, and that he believed he was buying the entire 8 annas, 11¼ gundahs share; but that this good faith and belief on the part of the purchaser do not entitle him to claim the minors' share as having passed by the sale.

"(6.) That there is no clear evidence as to whether the second Defendant, father of the minors, is carrying on the suit on behalf of the family; but that he, the mother of the Plaintiffs, and the Plaintiffs all live together, and that consequently a strong presumption arises that the suit is instituted by his direction, and paid for out of the family funds.

"(7.) That the two Plaintiffs ought to be put in possession of their shares, and the possession of the purchaser be maintained merely to the extent of *Girdhari's* interest in the estate; but that as the first Defendant purchased in good faith, and no one on behalf of the minors suggested the existence of their rights, they are not entitled to mesne profits of their shares up to the date of the suit.

"(8.) That the family is governed by the Mithila school.

"(9.) That the widow had received provision in cash from her husband, and was consequently not entitled to a share on partition.

"The order of the original Court was, that the estate should be divided into four shares, two to be regarded as belonging to the father, and so to have passed to the first Defendant by the execution sale, and one as belonging to each of the minor sons; that no mesne profits should be allowed previous to the date of the suit, and the wife's claim to a share should be dismissed.

"Upon these findings, it is contended on appeal, (1.) that the property was not ancestral, and (2.) that even if it were, the auction sale passed to the purchaser the entire 8·11½ gundahs share of *Girdhari Lal's* family, and that it cannot now be impugned by the minor sons. As to the first point, there is, in my opinion, no ground for the contention that the act of the father, in apportioning the ancestral estate between his two sons, had

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the effect of converting its character and rendering it 'self-acquired' in the sons' hands. The question whether such an apportionment could legally be made is immaterial; but in any case, there was nothing to alter the nature of the property. The rule governing the subject was laid down by this Court in *Muddun Gopal* v. *Ram Buksh Pandey* (1), and the same view is expressed by the *Madras* High Court in *Tara Chand* v. *Reeb Ram* (2), and in Mr. *Mayne's* Treatise, p. 231. The property must accordingly be regarded as ancestral, and the question next arises, what, assuming it to be ancestral, was the interest which passed to the auction purchaser in virtue of the execution sale. In order to decide this point, it is necessary to examine with exactness the transactions out of which that sale arose. These begin with the loan from *Christian*, and the two instruments executed at the same time for securing its repayment. The effect of these seems to have been to create in a roundabout way a charge on the whole of the leased property for repayment of the loan and interest in the instalments mentioned. It is stated in the first Defendant's written statement, and that statement has not been denied, that *Collis* was son-in-law of *Christian*. Construing the three documents with reference to this fact, and in the light which they throw upon one another, it must, I think, be inferred that they virtually constituted one transaction; that the money was advanced by *Christian* in consideration of and on the security of the two other deeds; that there was practically an assignment of the property to *Collis* for the purpose of securing repayment of the loan, and a declaration of trust on his part that he would thus apply the proceeds of the estate.

"We next come to consider the object for which the loan was effected. As to this, we have the fact that in 1272 *Girdhari Lal* was engaged in litigation with his brother as to their respective shares in the family estate; that *Kirat Singh's* income was three lacs, and that his debts amounted at the time of his death to a sum between one and two lacs; that at the time of separation, the family debts amounted to six or seven lacs; that in 1272 the janeo ceremony of *Hansbelasi*, one of the Plaintiffs, was performed at a cost which might be Rs.50,000; that the same ceremony was

(1) 6 Suth. W. R. 71. (2) 3 Mad. H. C. Rep. 50.

performed for a lunatic brother at a cost of Rs.20,000. Besides these legitimate grounds of expenditure, some acts of personal extravagance on the part of *Girdhari Singh* are alleged. It is, however, stated by one of the Plaintiff's own witnesses, that the Rs.45,000 were borrowed for the purpose of litigation with *Girdhari Singh's* brother. The debt having been thus incurred and thus secured, *Girdhari* dispossessed the holder of the property which he had thus leased and charged with the trust for repayment, and a suit having been brought by the lessee against him for mesne profits and interest, a decree was given and ultimately executed by the sale of that part of the family property which had been the subject of the lease.

"The facts, then, amount to this: The father and manager of an undivided family, with minor sons, having ancestral and other debts, and legitimate family expenses to defray, borrows money and creates a trust by which he charges a portion of the joint estate with the interest and repayment of the loan. He then, in violation of the trust deed, dispossesses the trustee; and he, and presumably the joint family, enjoy the profits arising from the dispossession. Thereupon he is sued by the trustee, and a decree is given against him for restoration of possession to the lessee for the term of the lease and for the amount of mesne profits which he has unlawfully enjoyed. In execution of this decree the property in question is ostensibly put up to sale and is purchased by a *bonâ fide* purchaser; he, and apparently all parties to the transaction, believing that the entire estate was sold. Every possible objection is raised by the father to the legality of the sale and the purchaser's subsequent possession under it, except that which is now for the first time urged, viz., that by it only the interest of the father passed, and that the rights of the two minor sons remained unimpaired. What, under these circumstances is the position of the *bonâ fide* auction purchaser? Did he take by the sale merely the father's right, title, and interest, as the Court below held, or did he, as is now contended in appeal, purchase the entire estate?

"In answering this question, we have first to take into account the fact that this claim is put forward on behalf of the minors by their mother while she and they are still living and messing

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jointly with the father, and it would perhaps be hardly too much to infer, as the Court below is inclined to do, that the present suit is promoted by him and paid for out of the family funds for the purpose of partially defeating the auction sale and giving it a different and less effect than that which the auction purchaser and all other persons interested have all along believed it to have. Whatever objections, therefore, would apply to such an attempt, if made by the minors themselves, must be equally applicable to the contention made on their behalf by their guardian, acting, as we cannot but presume that she is, under the inspiration and with the acquiescence of the manager himself. We must in fact regard this suit as a collusive attempt by sons to set aside, partially or wholly, the effect of the sale, and to take advantage of a mistake on the part of the purchaser, to which the acquiescence of the manager and their special representative contributed, and by which they, as sharers in the general family funds, have benefited. This is not necessarily fatal to their case if their rights have been illegally invaded; but it must dispose us to regard their claim with disfavour, as one generally discountenanced by Hindu law and the accepted canons of religion and morality. We must give the minors their rights, but the equities of the case are all against them.

"In the first place, then, what did the auction sale purport to convey to the purchaser? The decree in this case was for restoration to the Plaintiff of the possession to which she was entitled under the lease, and for payment of mesne profits. It did not affect any specific portion of the estate, and in this respect the present case differs from those in which a specific portion of the estate having been mortgaged a decree was given for its sale, and no question as to the actual property sold could arise. This being so, we have next to look to what the language of the sale proceedings expresses to be the subject of the sale. In the petition for execution an inventory of the judgment-debtor's property was given, which described it as 'the share of 8 annas 11¼ gundahs out of the entire 16 annas, *the right and interest of the judgment-debtor in mouzah Rampore Bhatkera*, bearing a jumma of Rs.8106 11*a*.,' and prayed that this might be attached and sold. The proceeding confirming the sale, and the certifi-

cate of sale produced at the hearing of the appeal, are to the same effect, viz., describing the property as 8 annas 11¼ gundahs share, and stating it to be the right and interest of the judgment debtor in the whole estate. This language might be regarded as specifically stating the object of the sale, viz., an 8 annas 11¼ gundahs share in the 16 annas, and the statement as to its being the right and interest of the judgment debtor as more description. Sect. 249 of the *Civil Procedure Code*, however, provides that the proclamation of sale shall declare that the sale extends only to the right, title, and interest of the judgment debtor in the property specified; and it may be contended that, read in the light of this section, this was the proper meaning of the petition and the certificate. This is the view taken by the original Court. On the other hand, there was much in the character of the previous transactions and the proceedings in the case to justify a more extended meaning. The action was one against the father and manager for a wrongful act affecting the joint estate, and by which the joint family had benefited. The whole 8 annas share, and not merely *Girdhari's* interest in it, had been originally charged with the payment of the instalments and interest in violation of this charge, and it was for the profits wrongfully obtained and presumably enjoyed by the joint family that the suit had been brought and the property put up for sale. The interest of the ostensible owners would not unnaturally be supposed to be identical throughout all the proceedings. Though the sale effected was not on a mortgage decree against specific mortgaged property, it arose out of a charge legally imposed upon specific property and the unlawful breach by the manager of the terms involved in that charge, and thus a purchaser might reasonably be led to believe that the entire property was being put up to sale. As to this, the original Court observes: 'The circumstances at the time of sale were such as to impress any person not acquainted with the minor Plaintiffs' family, with the belief that the entire share aforesaid was the property of the *Babu* Defendant, and it is very probable that upon such belief the first party Defendant made the auction purchase; and when the first party Defendant enforced the process of delivery of possession, no one even at that time on the

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part of the minor Plaintiffs or *Mussamut* Plaintiff offered opposition, and the absence of such opposition confirmed the first party Defendant in his belief. Hence the first party made a *bonâ fide* purchase of the entire share of 8 annas 11¼ gundahs in the belief that it belonged to the *Babu* Defendant, and entered upon possession, and the minor and *Mussamut* Plaintiffs, by the omission of an act, allowed that belief which was founded on good faith to stand up to the day of institution of this suit.'

"The Judge goes on to arrive at the conclusion that the Plaintiffs and their mother believed, at the time of sale, that the entire 8 annas 11¼ gundahs were being sold, and that in fact it is only owing to the new view taken of such proceedings consequent on the decision of the Judicial Committee of the Privy Council in the case of *Deendyal* that the present claim is advanced. The probability that this was so, is greatly increased by the fact, that though the father persistently disputed the validity of the sale, and carried the case up to the Privy Council, he on no occasion took the point that the minors' share of the property was not affected by it. I must therefore conclude, that whatever may have been the ambiguities in the language employed, the interest which the Court intended to sell, and which the purchaser and all others concerned believed that he was buying, was the whole 8 annas 11¼ gundahs share, of which *Girdhari Singh* was ostensible owner, and that as a fact, the purchaser has, under the sale, been put in actual possession of the whole of that share. This being so, I come to consider the claim of the minor sons to set the sale wholly or partially aside. As regards that part of the Plaintiffs' prayer which seeks to have the auction sale of the 9th of September, 1872, set aside, there is no difficulty in deciding that it ought not to be granted. The doubts which formerly existed in *Bengal* on this point, were removed by the decision in *Deendyal* v. *Jugdeep Singh* (1) and *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), the result of which case is to affirm that in *Bengal*, as in the other Presidencies, the undivided interest of a Mitakshara coparcener in the joint property may be sold in execution of a decree against him for his personal debt. It is less easy to dispose of the contention that the sons' share of the estate was

(1) Law Rep. 4 Ind. Ap. 247. (2) Law Rep. 6 Ind. Ap. 88.

not affected by the execution sale. As to this, it has been pressed upon us, that we are concluded by the decision in *Deendyal* v. *Jugdeep Singh* (1) from holding that anything more than the right, title, and interest of the judgment-debtor passed in the present instance by the sale. I do not, however, consider that this is the necessary legitimate result of that decision. It is true that it was then held that in the circumstances of the case, the judgment creditor purchasing at an execution sale of a money decree obtained against a member of a joint family, had acquired only the right, title, and interest of the judgment debtor; and that if he had wished to go further and enforce his debt against the whole family, he ought to have framed his plaint accordingly, and made the co-sharers parties. I think, however, that the observations in that judgment must be read with reference to the circumstances of the case, and not as laying down an invariable rule that in no case will the coparceners' interest pass in an execution sale unless they are joined in the suit. Such a view would be in direct contradiction of the rule laid down in *Muddun Thakoor* v. *Kantoo Lal* (2) in the Privy Council and the decisions of this Court which have followed that ruling. I think, therefore, that although there may be cases in which the debt is personal to the father, and the father's interest alone is affected by the decree, there are other circumstances in which the father should be presumed to have been acting on behalf of the family, and the decree accordingly to have been one binding on the joint estate, and that in the absence of words to a contrary effect, the execution sale affects the whole property and not merely the judgment debtor's interest in it. The present case appears to be of this character. The debt was one which *primâ facie* certainly could have been recovered from the sons; the manager was the only ostensible owner, representing the family to the world at large, and it would seem to follow that the interest affected by the execution proceedings should be the interest with which *Girdhari Lal* was competent to deal, and which was in fact his, so far as liability for his debts, not being immoral, was concerned. Upon the whole, we consider that the sale having been in discharge of the father's antecedent debt, which, accordingly, the sons could

(1) Law Rep. 4 Ind. Ap. 247 (2) Law Rep. 1 Ind. Ap. 333.

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repudiate only on the ground of its immorality—the joint family having presumably benefited by the wrongful act which resulted in the decree and execution sale—the language of the execution proceedings not being inconsistent with the view that the whole estate was sold—the mistake, if mistake there was, as to the interest passed by the auction sale having been one which the minors' guardian might have prevented and did not prevent, and actual possession of the entire 8 annas 11¼ gundahs having been taken under the sale by the auction purchaser, we are not now at liberty to set it aside, and declare that the first Defendant's possession, so far as the sons' interests are concerned, has been unlawful. We think that we are bound to follow the rule laid down by the Privy Council in *Suraj Bunsi Koer* v. *Sheopershad Singh* (1), viz., that, when joint ancestral property has passed out of a family either by a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay such a debt, or in execution of a decree for the father's debt, the sons cannot dispute it except by shewing, (1.) that the debt was immoral, and (2.) that the purchaser had notice of the immorality. This rule was held not to be applicable in that case, and the Plaintiffs were allowed to contest the sale on the ground that the purchaser had notice of their claim, but that is not suggested to have been the case in the present instance, and we think that its general principle ought to govern our decision. This view appears to be in accordance with the principles laid down by the Judicial Committee in *Bissessur Lal Sahoo* v. *Luchmessur Singh* (2), and in *General Manager of the Raj Darbhanga* v. *Maharaj Coomar Ramapat Sing* (3) as to the interpretation to be put on execution proceedings, when the wording leaves room for doubt as to the interest which they affect. I think, accordingly, that this appeal must be admitted, and the Plaintiffs' suit should be dismissed with costs throughout."

Doyne, for the Appellants, contended that the First Court was right in holding that only the interest of *Girdhari Singh* had been actually attached and sold. The purchaser had no reason

(1) Law Rep. 6 Ind. Ap. 88. (2) Law Rep. 6 Ind. Ap. 233.
(3) 14 Moore's Ind. Ap. Ca. 605.

for concluding that anything more than *Girdhari's* interest had been intended to be sold. He was bound to inquire and ascertain whether the property sold was *Girdhari's* ancestral or self-acquired estate, and whether, if ancestral, he had minor sons equally interested with him in that property, who would be affected by the sale. Further than that, on the evidence it must be taken that the debt had not been incurred by *Girdhari* for any necessary purpose, or for the benefit of the joint family. It was incurred in respect of *mesne* profits, for which liability had arisen in respect of a wrongful ouster by *Girdhari* alone. Under the Mitakshara or Mithila law, the obligation upon sons to pay their father's debts applies only to the case of his death and their taking by survivorship his share, and not to a case like the present, where he survives and has ample property to pay his debts. Reference was made to *Muddun Thakoor* v. *Kantoo Lal* (1); *Deendyal* v. *Jugdeep Singh* (2); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3); *Hunoomanpershad Panday* v. *Mussumat Babooee Munraj Koonweree* (4); *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (5); *Collector of Monghyr* v. *Hurdai Narain Shahai* (6). It was also contended that the First Court was in error in holding that under the Mithila law *Girdhari* would on partition have been entitled to half of the whole property in suit, and in holding that the Appellant *Nanomi* was by reason of her father-in-law having given her a village, debarred from claiming her due share on partition. Reference was made to Mitakshara, c. i. s. 2, v. 8; *Mahabeer Pershad* v. *Ramyad Singh* (7); *Macnaghten's* Hindu Law, vol. i., p. 47; *Strange's* Hindu Law, 4th ed., p. 188, on Partition; *Mayne's* Hindu Law, s. 403; Vivada Chintamoni, 231; *Colebrooke's* Digest, 3rd ed., vol. ii., p. 216; bk. v., c. i.; bk. v., c. ii., v. 96.

Woodroffe, and *C. W. Arathoon*, for the Respondents, contended that the High Court was right, and that the purchaser was entitled to the whole share of the estate sold. The concurrent

(1) Law Rep. 1 Ind. Ap. 321.
(2) Law Rep. 4 Ind. Ap. 247.
(3) Law Rep. 6 Ind. Ap. 88.
(4) 6 Moore's Ind. Ap. Cas. 424.
(5) Law Rep. 9 Ind. Ap. 128, 143.
(6) Ind. L. R. 5 Calc. 425.
(7) 12 Beng. L. R. 90, 98.

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decisions of the Courts below, that the entire share was sold, are findings of mixed law and fact, and do not preclude the contention that it was not ancestral, according to the law laid down in *Mohabeer Koer* v. *Joobha Singh* (1). Upon the evidence, the property was sold to pay off an antecedent debt incurred for the benefit of the joint property. The joint family had benefited by the wrongful ouster effected by *Girdhari*, and the decree for *mesne* profits was in effect for restitution of what the family had wrongfully received and benefited by. It appears from the evidence and the finding even of the First Court, that all parties understood that the subject of sale was the entire share of the estate, and not merely *Girdhari's* interest. Then as to the legal rights of the sons, a Hindu son is liable for his father's debts to the extent of the assets which have come to him by birth under the Mitakshara, by death under the Dayabhaga. Sons and fathers are not under the Mitakshara co-equal as regards authority to deal with the estate. The father's position is analogous to that of a Hindu widow in *Bengal*. He represents the estate and represents his sons: see *Jugal Kishore* v. *Maharajah Jotindro Mohun Tagore* (2); *Jutadhari Lal* v. *Raghoobeer Persad* (3); and the class of cases where the Court has held that the father, though the only person named, was in fact representative of the family. Mitakshara, Supplement to vol. i. of *Macnaghten's* Hindu Law "On Judicial Proceedings," s. 13, c. 4, p. 153; *Baso Koer* v. *Hurry Dass* (4); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (5); *Sheo Proshad* v. *Jung Bahadoor* (6); *Umbica Prosad Tewary* v. *Ram Sahay Lall* (7). The cases in *Bengal* establish that the particular order to sell is not conclusive as to what really passes by the sale. If the purchaser is also the execution creditor, the rule would be different so far, that the order would be strictly construed against him. In other cases it is matter of evidence what was really attached, sold and bought according to the intention and understanding of all parties to the transaction. The other Courts in *India* have, however, taken another view,

(1) 16 Suth. W. R. 221.
(2) Law Rep. 11 Ind. Ap. 66.
(3) Ind. L. R. 9 Calc. 508.
(4) Ind. L. R. 9 Calc. 495.
(5) Law Rep. 6 Ind. Ap. 88.
(6) Ind. L. R 9 Calc. 389, 393.
(7) Ind. L. R. 8 Calc. 808.

and held that the question of the liability of the father's share of the whole family estate depends on the nature of the debt. See *Ponnappa Pillai* v. *Pappuvayyngar* (1) cited with approval by the Judicial Committee in *Muttayan Chettiar* v. *Sangili Vira Pandin Chinnatambiar* (2). Practically, however, it comes to the same thing. The *Bengal* decisions say that the son's interest is *primâ facie* concluded by a decree against the father, though if he was not a party, he may question the decree upon any ground upon which he could have contested it if he had been a party, one ground being that the debt was an immoral one. The *Madras* Courts say that the son is always bound unless he shews that the debt is immoral. His objection that it was not incurred for a joint family purpose is not so readily listened to. The father being the representative of the family may bind it; and the sons have this remedy, that they can restrain their father from improperly dealing with the ancestral estate: *Deva Singh* v. *Ram Manohar* (3); *Ramnarain Lal* v. *Bhawani Prasad* (4). Reference was also made to West and Buhler, p. 455. [Their Lordships intimated that they would decide the main point first, without hearing the Respondents upon the minor points at present.]

Doyne, replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is one of the cases, frequently occurring of late years, which raise questions as to the circumstances under which ancestral estate of a family subject to the Mitakshara law becomes liable to answer the debts of the head of the family.

This family is one governed by the Mithila law, which on the point under consideration does not differ from the Mitakshara. Its head is one *Girdhari Singh*. He has a wife, the Appellant *Nanomi Babuasin*, and two sons, the other two Appellants, who were born before the transactions which gave rise to this

(1) Ind. L. R. 4 Madras, 1.
(2) Law Rep 9 Ind. Ap. 144.
(3) Ind. L. R. 2 All 746, 751.
(4) Ind L. R. 3 All. 443, 445.

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suit, and were minors when this suit was commenced. The family are, or were, possessed of valuable ancestral property in land.

In the year 1870 one Mrs. *Collis*, complaining that *Girdhari* had wrongfully ousted her from land held under lease from him, sued him to recover possession and mesne profits. The lease had been granted as part of an arrangement under which *Girdhari* took a loan of Rs.45,000 from Mr. *Collis*, the predecessor in titie of Mrs. *Collis*. On the 10th of April, 1871, a decree was made according to the prayer of Mrs. *Collis's* plaint, and the sum of Rs.32,318 was awarded to her for mesne profits.

On the 9th of September, 1872, a portion of the family ancestral land was brought to sale by execution proceedings in satisfaction of the decree, and the Respondent *Hirdey Narain* became the purchaser. The property sold was described as "8 annas 11¼ gundahs out of the entire 16 annas, the right and interest of the judgment debtor in mouzah *Rampore Bhatkera*." The fraction mentioned was the share of the whole of *Girdhari's* joint family, the remaining annas and gundahs belonging to some relatives who were separate in estate. A dispute arose as to the regularity of the sale, which led to further litigation; but in the result the sale was upheld and *Hirdey Narain* took possession, which he still retains.

In September, 1878, the present suit was brought by the Appellants against *Hirdey Narain* and *Girdhari*. They pray that either the sale to *Hirdey Narain* may be wholly set aside, or that they may recover possession of the land and that *Hirdey Narain* may be put to take proceedings for partition. They contend first, that, nothing passed by the sale except such share as *Girdhari* would have taken on partition; and secondly, that he would only have taken one fourth part.

The Subordinate Judge of *Bhagulpore* agreed with the Appellants on the first point, but differed on the second. He was of opinion that by the Mithila law the wife, having had a provision made for her, would take no share on partition, and that the father would take a double share. He therefore gave the Appellants a decree for a moiety of the estates in suit. In deciding for the first contention, the Subordinate Judge founded himself

on *Deendyal's Case* (1). In his opinion, as Mrs. *Collis* sued *Girdhari* alone, she did not intend her decree to extend over the entire property of the joint family. And on the same grounds he construed the language used to describe the property in the execution proceedings as though it meant nothing more than the coparcenary interest of *Girdhari*.

Both parties appealed to the High Court, who were of opinion that the whole interest of the family passed to *Hirdey Narain* by the sale, and ordered that the suit should be dismissed with costs. The Court considered that the interest which all parties believed that *Hirdey Narain* was buying was the whole 8 annas 11 gundahs into possession of which he was actually put. As regards *Deendyal's Case* (1), they held that it does not lay down an invariable rule that in no case will the coparceners' interest pass in an execution sale unless they are joined in the suit. And they point out that in *Muddun Mohun's Case* (2), a different rule was laid down; and that in *Suraj Bunsi's Case* (3), a statement was made of the effect of the then decisions on the subject, which embodied the principle of *Muddun Mohun's Case* (2). The present appeal is brought from the decree of the High Court.

There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in *India* or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case.

It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of indepen-

(1) Law Rep. 4 Ind. Ap. 247. (2) Law Rep. 1 Ind Ap. 321.
(3) Law Rep 6 Ind Ap. 88.

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dent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's Case* (1) bound the Court to hold that nothing but *Girdhari's* coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's Case* (1) there certertainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings.

That brings their Lordships to consider the nature of the debt in this case. There was a great deal of discussion whether the debt originated in the loan of Rs.45,000, or in *Girdhari's* receipt of the mesne profits for which the decree was given. It appears to their Lordships that the new debt for which the decree was

(1) Law Rep. 4 Ind. Ap. 247.

made is the foundation of the sale. But, whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt The Subordinate Judge does not give any opinion on this point. If it is a joint family debt, a sale to answer it effected either by *Girdhari* or in a suit against him cannot be successfully impeached.

There remains only the question whether anything more than the father's coparcenery interest was bargained for, paid for, and taken possession of by the purchaser. On this point, their Lordships are clearly of opinion that the High Court have decided rightly. Indeed, the Subordinate Judge did not decide otherwise, so far as the facts go. As before mentioned, he held that only the coparcenary interest passed, because of the effect he ascribed to *Deendyal's Case* (1) But he was clear that the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same.

The purchaser therefore has succeeded in shewing that he bought the entirety of the estate, which could lawfully be sold to him, and the suit fails upon the merits. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the Appellants must pay the costs.

Solicitors for Appellants *Barrow & Rogers*
Solicitor for the Respondents: *T. L. Wilson.*

(1) Law Rep. 4 Ind Ap 247.

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July 9, 10, 15, 18.

COOMARI RODESHWAR . . . . . DEFENDANT;

AND

MANROOP KOER AND ANOTHER . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Discussion of Evidence and its Effect.

Case in which evidence is discussed and its true effect pointed out, and in which it is *held*, reversing a decree of the High Court, that an ikrarnamah relied upon by the Respondents was fabricated. It was connected with other documents already found to be forgeries, its contents did not dispel suspicion, it was not established by credible witnesses, nor supported by evidence of possession under it. No order made as to costs, fabricated documents having also been put forward on behalf of the Appellant.

APPEAL from a decree of the High Court (May 13, 1882) reversing a decree of the Subordinate Judge of *Tirhoot* (April 29, 1880). The issue in the case was as to the genuineness of an ikrarnamah dated the 13th of December, 1852. The First Court decided that it was fabricated; the High Court that it was genuine.

Cowie, Q.C., and *C. W. Arathoon*, for the Appellant.

Woodroffe, and *Branson*, for the Respondents.

The judgment of their Lordships was delivered by

LORD WATSON:—

The only substantial question in this appeal relates to the genuineness of an ikrarnamah, which is alleged by the Respondents to have been duly executed in their favour, on the 13th of December, 1852, by the deceased *Ramkishen Singh*, the husband of the late *Rajroop Koer*, the original Appellant, whose daughter, *Coomari Rodheshwar*, has now been substituted as Appellant by an Order in Council of the 24th of June, 1885.

Radha Mohun Singh, who died on the 24th of December, 1850,

* *Present*:—LORD WATSON, LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

was owner of an estate consisting of shares of numerous villages in pergunnahs *Mahashee* and *Bibrah*. On his decease, the estate was claimed, on the one hand, by *Ramkishen Singh*, as his maternal grandson and heir *ab intestato*, and, on the other hand, by *Roghunundun Singh*, son of *Dost Dewan*, an elder brother of *Radha Mohun*, as the guardian of *Deonundun Singh*, who was his nephew and a grandson of *Dost Dewan*. The Respondents, *Manroop Koer* and *Janki Koer*, are, respectively, the widow and daughter of *Hurnundun*, son of *Radha Mohun*, who died many years before his father. It is not matter of dispute that the Respondents were and are entitled to maintenance from the estate of *Radha Mohun*.

Cross applications were made by *Ramkishen* and *Roghunundun*, in the year 1851, under Act XIX. of 1841, for a certificate to the estate of *Radha Mohun*. In support of his claim, *Roghunundun* produced and founded on a wasiutnama or will, which purported to have been executed by *Radha Mohun*, upon the 7th of September, 1849, in favour of his ward *Deonundun*. The Judge appears to have declined to entertain any question as to the validity of the will, which *Ramkishen* disputed; and, accordingly, he dismissed *Ramkishen's* application, and directed that the minor *Deonundun*, under the guardianship of *Roghunundun*, should continue in possession, until some other order was passed.

On the 4th of October, 1852, *Ramkishen* brought a suit before the Zillah Court of *Sarun*, against *Deonundun*, and his brother *Sheonundun*, who had meanwhile succeeded to the guardianship on the death of *Roghunundun*, for the purpose of setting aside the will, and of establishing his right to succeed, as heir, to the estate of *Radha Mohun*. The suit was defended mainly on these grounds,—that there had been no partition of the ancestral estate between *Radha Mohun* and his brother *Dost Dewan*, and that the will of *Radha Mohun* had been duly executed. As regards the first of these defences, it is sufficient, for the purposes of the present case, to state that, whilst the Judge of first instance decided that there had been complete partition, the Judges of the High Court were of opinion that there had been none; and that, on appeal to this Board, their Lordships held that there had been a separation of the families and their estates,

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but that twenty-six villages or lots, forming part of the property in dispute, were excluded from the partition. As regards the second of these defences, all three tribunals pronounced against the validity of the will. The Judge of the Zillah Court was of opinion that there was no sufficient proof to establish the validity of the will; but the conclusion to which the High Court came, upon the evidence, was, "that the wasiutnama was not executed by *Radha Mohun Singh*, and that he did not give possession of his share of the estate to *Roghunundun Singh* as guardian for the minor *Deonundun*, but retained it till the time of his death." In accordance with its usual practice, this Board affirmed the concurrent decisions of the Courts below, upon this part of the case, it being admitted by the Defenders' counsel "that no special grounds existed upon which they could hope to disturb on appeal these concurrent judgments upon a question of fact." The result of the litigation, which began in October, 1852, and was terminated by the judgment of this Board on the 25th of March, 1875, was to affirm the right of *Ramkishen* to take, as heir, the whole estate of *Radha Mohun*, with the exception of the twenty-six villages or lots which were held to be joint ancestral estate.

The Respondents, *Manroop Koer* and *Janki Koer*, were called by *Ramkishen* as defenders in the suit thus instituted by him on the 4th of October, 1852; and it may be convenient to explain now the connection which the Respondents had with these proceedings.

Of the same date with the wasiutnama or will of the 7th of September, 1849, *Roghunundun Singh*, as the guardian of his nephew, executed an ikrarnamah, which is referred to in the will as containing the conditions laid down for the expenses and subsistence of *Radha Mohun*, as well as for the subsistence of the deorhi. That ikrarnamah narrates the execution and import of the will, and its first and leading condition is that fifteen mouzahs, which are described in a schedule annexed to the document, have been charged with payment of the personal expenses of *Radha Mohun* and the deorhi, &c., without being incumbered with payment of revenue, and other expenses in any suit relating thereto, during the lifetime of *Radha Mohun*, of

Mussumat Ram Koer, and of the Respondent *Manroop Koer*. Thereafter, on the 23rd of January, 1850, *Radha Mohun* executed, or at least is said to have executed, a deed or letter of gift, by which, after reciting the wasiutnama of the 7th of September, 1849, and the relative ikrarnamah of the same date by his son *Roghunundun*, and also the death of *Mussumat Ram Koer*, he makes over to the Respondent *Manroop Koer*, for her maintenance, "the fifteen mouzahs mentioned in the ikrarnamah, together with jagirs, mokurruri, &c., which are in the names of my dependents." There is a letter of the same date, purporting to bear the seal and signature of *Radha Mohun*, by which he directs possession of his shares of these fifteen mouzahs to be given to *Manroop Koer*, and declares that thenceforth he, and the legatee under his will, shall have no concern with the management of the villages, lands, &c.

Assuming, as we are bound to do, that the wasiutnama was not executed by *Radha Mohun*, it is impossible to suppose that *Roghunundun's* ikrarnamah, the letter of gift, and relative letter of intimation of the 23rd of January, 1850, are genuine documents. Independently of the wasiutnama, *Roghunundun's* ikrarnamah could have no meaning and no effect; and it is inconceivable that *Radha Mohun* should have made a gift to the Respondent *Manroop Koer* in these terms, when he had not parted with his estate, and should have affirmed the existence of a will which he had never executed. All of these documents hang together; they are *partes ejusdem negotii*, and their terms and character must have been known to all the fabricators, whoever they may have been. That the Respondent *Manroop Koer* had such knowledge is very plainly apparent from a petition of intervention presented by her against the claim of *Deonundun* for registration in the year 1859. In that proceeding, she founded upon the will and *Roghunundun's* ikrarnamah, and prayed for confirmation of her possession of her shares of the fifteen mouzahs, upon the allegation that they had been in her possession from the time when they were made over to her, by her father-in-law *Radha Mohun*, under a deed dated the 23rd of January, 1850.

The alleged ikrarnamah, the genuineness of which is the subject

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of controversy in the present appeal, bears date the 13th of December, 1852, about two months after *Ramkishen Singh* had brought his suit for establishing his rights as heir of *Radha Mohun*. It narrates the institution and object of that suit, and also that *Radha Mohun* "in his own lifetime had settled and granted kismut of the talook kolom out of his own shares and rights in villages and 377 bighas, 1 biswa of zerat lands mentioned below, for the expenses of *Mussumat Manroop Koer*, the widow, and *Babui Janki Koer*, minor daughter, the heir of *Rajcoomar Babu Hurnundun Singh*, deceased, *and accordingly it is in the possession of the aforesaid ladies.*" *Ramkishen Singh* then goes on to declare that, in the event of a favourable issue to his suit, on his obtaining possession of the villages mentioned in his plaint, he "shall confirm and maintain" the possession of the Respondents "over the villages mentioned below, and the zerat lands in hât and gunge of *Kahturwa*, and hât and gunge of *Birugnian, as before.*" He farther declares that the two Respondents, "*who are in possession of the aforementioned villages and zerat, &c., shall as before remain in possession,* and pay the proportionate recorded Government revenue into the treasury of the Collector." There is no consideration expressed in the deed, but the Respondents aver, in their plaint, that *Ramkishen Singh* was, at the time, in straitened circumstances, that the Respondent *Manroop Koer* helped him fully with money, influence, and with oral and documentary evidence; that the suit was brought and the case conducted with her aid; and that owing to her help thus given to him, as well as in consideration of the Respondents' rights which his ancestor had granted, *Ramkishen*, during the pendency of the case, executed and delivered to them the ikrarnamah in question.

Ramkishen Singh did not live to reap the fruits of his successful litigation, having died upon the 18th of October, 1875, before the order of Her Majesty in Council could be carried into execution. It was not until his widow, the late *Rajroop Koer*, took steps to have her name registered as owner of all the villages to which he was found to have right, by that order, that the Respondents asserted their right to have possession of the mouzahs now in question, in virtue of the alleged ikrarnamah of the 13th of

December, 1852. That circumstance does not appear to be in itself material, inasmuch as the ikrarnamah, even assuming its validity, did not, by its terms, become legally enforceable against *Ramkishen*, or his representatives, until they actually obtained possession of the estate decreed to him. Notwithstanding the opposition of the Respondents, *Rajroop Koer*, in April, 1878, eventually succeeded in obtaining registration; and that led to the institution, by the Respondents, of the suit in which this appeal is taken, in which they pray, *inter alia*, to have their right to the mouzahs therein specified established in terms of the said ikrarnamah of the 13th of December, 1852; to have their possession of the property in suit confirmed and allowed to stand; and to have the name of *Rajroop Koer* expunged, and their own names inserted in the register as owners of the mouzahs.

The alleged ikrarnamah by *Ramkishen*, which is the sole foundation of the claims urged by the Respondents in this suit, appears to their Lordships to be *primâ facie* a document of very doubtful authenticity. From the narrative already given of the transactions by which it was preceded, during the lifetime of *Radha Mohun*, it is obvious that a system of fabrication of deeds was being unscrupulously carried out, with the view of depriving *Ramkishen Singh* of his inheritance, and of vesting the succession which truly belonged to him in *Deonundun* and the Respondents. *Roghunundun's* ikrarnamah, and *Radha Mohun's* two letters of the 23rd of January, 1857, were undoubtedly fabricated in the interest of the Respondents; and it is by no means improbable that those persons, who had already been guilty of such fraudulent practices, for the purpose of giving the Respondents possession of the fifteen mouzahs, should have gone one step farther, in order to secure the possession of the Respondents, in the possible event of these previous frauds being detected, and *Ramkishen's* right of inheritance vindicated. In point of fact, the ikrarnamah attributed to *Ramkishen*, is, by its tenor, almost as closely linked to the deeds previously fabricated, as each of these deeds is to the others; and it is not easy to reject the inference that the same tissue of frauds runs through them all, and connects the ikrarnamah now set up with its predecessors, which were falsely represented to be the deeds of *Radha Mohun*.

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The internal evidence afforded by the ikrarnamah of the 13th of December, 1852, does not tend to dispel the suspicions created by its antecedents and general character. *Ramkishen* is thereby made to affirm that *Radha Mohun* had granted certain villages to the Respondents for their maintenance; and it is not pretended that there ever was such a grant, unless it were contained in the letter of gift dated the 23rd of January, 1850, which is not a genuine letter. It is hardly credible that *Ramkishen* should have recognised the authenticity of that letter or the validity of the gift thereby made to the Respondents; because the letter, if genuine, was an affirmation, under the hand and seal of *Radha Mohun*, that he had executed the very wasiutnama which *Ramkishen* was then endeavouring to set aside on the ground that it had not been executed by *Radha Mohun*. It might possibly be suggested that *Ramkishen* accepted the Respondents' statement that there had been such a gift to them by *Radha Mohun*; but the Respondents cannot make that suggestion, because any such statement would have been false and fraudulent. It is also a remarkable feature of this ikrarnamah that it makes *Ramkishen* undertake an obligation to "confirm and maintain" the Respondents' possession, not only of the fifteen mouzahs included in *Radha Mohun's* fabricated letter of gift, but of six additional mouzahs, of which *Ramkishen* is farther made to state that the Respondents were actually in possession at the date of the ikrarnamah. That statement is now proved to have been untrue; but an ingenious attempt has been made to shew that the obligation undertaken by *Ramkishen* was, to confirm the Respondents' possession of the fifteen mouzahs, and to deliver to them possession of the six new mouzahs. In the opinion of their Lordships it is impossible to put that construction upon the plain and unambiguous language of the deed; and it is not the construction which the Respondent themselves have put upon it, but a mere afterthought, suggested by the necessities of their case. In the 5th article of their plaint the Respondents aver that—"In accordance with the ikrarnamah above adverted to (*i.e.*, the ikrarnamah of the 13th of December, 1852), *Rajah Ramkishen Singh*, husband of the Defendant, having admitted the proprietary right and title of the Plaintiffs *to the mouzahs, lands, gunj, &c., specified in the*

ikrarnamah aforesaid, which were in the possession of the Plaintiffs since former times." Again, in the 7th article of their plaint they aver that the Appellant, after the death of *Ramkishen*, "executed the decree of the Privy Council, and, at the time of carrying out the process of delivery of possession, in conformity with the conditions set forth in the ikrarnamah above adverted to, *allowed the possession of the Plaintiffs to stand in regard to the mouzahs and lands specified below*, which are included in the decree of the Privy Council."

The Respondents may, of course, rebut the presumptions arising from these suspicious circumstances by reliable evidence shewing that the ikrarnamah was, in point of fact, duly executed and delivered to them by *Ramkishen Singh*. The burden of proving the due execution and delivery of the deed lies upon the parties who, in these circumstances, are endeavouring to set it up; and it now becomes necessary to consider how far the Respondents have succeeded in satisfying the heavy *onus* thus incumbent on them.

The evidence adduced and relied on by the Respondents, in support of the genuineness of the ikrarnamah, may be conveniently dealt with under these two heads:—First, evidence tending to prove that the deed was executed by *Ramkishen*, on the date it bears; and that, in consideration of its execution and delivery to them, the Respondents, in terms of a verbal agreement to that effect, gave *Ramkishen* documents, and money to the amount of Rs.5500, to assist him in the prosecution of his suit; and secondly, evidence tending to prove that *Rajroop Koer*, after her husband's death, fully recognised the validity of the ikrarnamah; and also that, at the time when she executed the decree of the Privy Council, *Rajroop Koer* expressly confirmed the Respondents' possession of the fifteen mouzahs described in *Radha Mohun's* letter of gift, and likewise gave them possession of the six additional mouzahs specified in *Ramkishen's* ikrarnamah.

Their Lordships agree with the Judge of the Subordinate Court in thinking that the evidence comprised in the first of these heads is not of a reliable character. There are, no doubt, four witnesses, *Sham Lal*, *Chulhai Roy*, *Chowdry Jodu*, and *Sajiwan Lal*, who speak to the verbal communications which are alleged to have passed between *Ramkishen* and the Respondents, at the

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time when the ikrarnamah is said to have been arranged and executed; but their depositions are neither consistent with each other, nor satisfactory, and, moreover, they do not tally with the terms of the ikrarnamah. *Chulhai Roy* also attests his own signature, as a witness, to the ikrarnamah, and another witness attests his father's signature; but the evidence of *Chulhai Roy* upon that point cannot be credited, if his testimony, upon other and equally important matters, be, as their Lordships think it ought to be, rejected. There is also a considerable amount of oral testimony as to the money payments, amounting in all to Rs.5500, said to have been made at various times to *Ramkishen*; and that evidence is supported by letters alleged to have been sent to the Respondent *Manroop Koer* by *Ramkishen*, none of which are authenticated by his seal or signature. In a case like the present, where there has been so much fabrication of formal deeds, such writings as these must be received with extreme caution. Regular account books were kept by the Respondents, but these have not been produced. It is not probable that *Ramkishen Singh*, who at the time when the greater part of these advances are said to have been made, was the adopted son of a wealthy Maharanee, stood in need of pecuniary assistance. Nor is it probable that money intended for remittance to *Calcutta* or *London*, for the purposes of *Ramkishen's* suit, should have been sent to him *in specie*; but evidence of payment in that shape can be very easily got up, and cannot be so easily checked as when money is remitted by banker's draft or letter. The Subordinate Judge before whom the numerous witnesses who testified to these payments were examined, did not believe them; and that is a circumstance to which their Lordships attach considerable weight, especially in a case where the conclusion drawn by the Judge who saw the witnesses under examination is in accordance with all the presumptions arising from facts established beyond dispute.

It has also been argued in connection with this part of the case that the written pleadings filed by the Respondents, as defenders in *Ramkishen's* suit, afford conclusive evidence that they were acting in concert with the Plaintiff, and aiding his contention that the wasiutnama set up by *Deonundun* and his guardian was invalid. The learned Judges of the High Court express an opinion that "in both these written statements the wasiutnama

was denounced as an unreal document." Their Lordships have been unable to find a single passage in these documents which will bear that construction. *Manroop Koer* did state by her pleader that, "according to the assertion of the Plaintiff, the wasiutnama was in reality false;" but the substance of her defence was that the wasiutnama had already been held to be valid, in the proceedings under Act XIX. of 1841, and that, inasmuch as *Deonundun* and his guardian had been, "in conformity with the condition laid down in the said wasiutnama, as well as in the ikrarnamah dated the 7th of September, 1849, executed by Rajah *Roghunundun Singh*, in possession, and your Petitioner's client, too, has been in possession of some of the villages covered by these documents. Where then has the Plaintiff any claim now?" In the written statement filed by *Janki Koer*, it is not asserted that *Radha Mohun* did not, in point of fact, execute the wasiutnama, but that *Radha Mohun* had no power to dispose thereby of certain village shares which, she alleged, had pertained to her father, and belonged to her by right of inheritance.

To come next to the evidence of possession, which is of some importance in this case. There can be no doubt that, if the Respondents were able to shew that, before this suit was instituted, they had, with the assent of *Rajroop Koer*, obtained, and had thereafter continued in possession of the mouzahs in question, under and in virtue of the ikrarnamah of the 13th of December, 1852, that would go a long way towards establishing the validity of the deed, in any question between them and the Appellant. The alleged possession of the Respondents may be divided into three periods. The first of these begins with *Radha Mohun's* letter of gift, dated the 23rd of January, 1850, and ends with the execution of the decree of the Privy Council, in favour of *Ramkishen*, by his widow, *Rajroop Koer*; the second begins with the execution of that decree, and terminates with the institution of the proceedings taken by *Rajroop Koer*, with the view of obtaining registration of her name as owner of the mouzahs in question; and the third embraces the period between the last-mentioned date and the institution of the present suit by the Respondents.

Having regard to the terms of the judgments pronounced in *Ramkishen's* suit, to which the Respondents were parties, it is at least doubtful whether they can be held to have been in posses-

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sion of the fifteen mouzahs specified in the letter of gift of the 23rd of January, 1850, before the death of *Radha Mohun*, on the 24th of December of the same year. But it does not seem to admit of doubt that, from the death of *Radha Mohun*, until the decree of the Privy Council was executed by *Rajroop Koer*, the Respondents were in the possession of these mouzahs. Their possession, during the whole of that period, was dependent upon the right of *Deonundun*, derived from the invalid wasiutnama of the 7th of September, 1849, and can therefore throw no light upon the question arising for decision in this appeal. The state of actual possession during the third period already referred to is also, in the estimation of their Lordships, of little or no value as evidencing the genuineness of *Ramkishen's* ikrarnamah, because, during the whole of that period, there were disputes going on, both as to the validity of that deed, and the possession of the mouzahs to which it relates.

The second of the periods referred to is, accordingly, the only one which is of real importance, as regards possession. A great mass of oral testimony has been adduced by the Respondents, to the effect that, when the decree of the Privy Council was executed, *Rajroop Koer* caused intimation, at the same time, to be made to all concerned, that the Respondents were to remain in possession of the mouzahs already possessed by them, and were also to have possession of the six new mouzahs specified in *Ramkishen's* ikrarnamah. Their Lordships have come to the conclusion, with the Judge of the Subordinate Court, that the witnesses who speak to these facts are unworthy of credit. They are unable to indorse the views expressed, upon this part of the case, by the learned Judges of the High Court. They seem to be of opinion that, it not being proved to their satisfaction that *Rajroop Koer* was in actual possession of these mouzahs, it must necessarily follow, not only that the Respondents were in possession, but that possession had been ceded to them by *Rajroop Koer* in terms of *Ramkishen's* ikrarnamah. But it must be observed, that the execution of the decree of 1875 had not the effect of transferring actual possession, it was merely an authoritative intimation, to persons interested, that the decree holder had the right to possess for the future. Nothing is more probable than that the Respondents, who had then begun to set up the ikrarnamah, upon

which they now rely, should have attempted to retain the mouzahs which they then possessed, and to usurp possession of the additional mouzahs which they now claim. But it does not follow that *Rajroop Koer* assented to their retaining or taking possession. On the contrary, all the real evidence, apart from the depositions of the Respondents' witnesses, points to the conclusion that she did not assent. About a year after the execution of the decree, *Rajroop Koer* presented four separate petitions for registration, in respect of these very mouzahs, all of which were opposed by the Respondents, on the ground that they were in possession under *Ramkishen's* ikrarnamah. The question of possession was decided against the Respondents, both in the Collector's Court, and in the Civil Court to which they appealed. It is a remarkable fact, and one not easily reconcilable with the depositions of the Respondents' witnesses in this suit, that, as recorded by the Judge in these registration proceedings, *Manroop Koer* virtually abandoned "her claim respecting present possession," and merely pleaded that she had a right to be in possession. The Judge of the Civil Court not only records the fact that her allegations of present possession were given up, but states expressly that it was quite clear that *Rajroop Koer*, when taking out execution of the Privy Council's decree, made no exception of shares in the Respondents' favour, but took out execution of the entire decree. The Respondents have made no attempt to explain the reason why that judicial admission was made in April, 1878; and the absence of any such explanation strongly suggests that the evidence of possession which they have adduced in this suit was not, at that time, in existence.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court, dated the 13th of May, 1882, ought to be reversed, and the judgment of the Subordinate Court, dated the 29th of April, 1880, restored. Seeing that both Courts below have held that the original Appellant was guilty of using fabricated documents in support of her allegations of possession, their Lordships deem it right to mark their sense of the impropriety of such conduct by making no order as to costs.

Solicitors for the Appellant: *Henderson & Co.*

Solicitors for the Respondents: *Woodroffe, Burgess, & Loch.*

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Feb. 6.

MAHARAJAH MIRZA SRI ANANDA, SULTAN BAHADOOR OF VIZIANAGRAM SAMASTANAM . . . . . PLAINTIFF;

AND

PIDAPARTI SURIANARAYANA SASTRI AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Madras Regulation XXV. of 1802, *sect.* 3—*Inams—Presumption.*

Madras Regulation XXV. of 1802, sect. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zemindar has no power to disturb grants otherwise valid made by his predecessor, or titles to inams acquired by prescription.

Where inamdars had received a grant in perpetuity of certain lands in 1811, and in 1863 had received a regrant thereof from the Appellant's predecessor on terms less favourable to themselves, *held*, that the Appellant had no power after the death of the last mentioned grantor to determine their tenancies by notices to quit.

APPEAL from a decree of the High Court (May 1, 1883) reversing a decree of the Subordinate Judge of *Vizagapatam* (May 12, 1882) and dismissing the Appellant's suit with costs.

The Appellant brought his suit on the 1st of March, 1882, against thirty Defendants, of whom the Respondents were the first eight, to recover the village of *Buradapeta* in his principality, and also a sum of Rs.337 balance of kattubadi or cost for the years 1289 and 1290, and also to recover Rs.2000 for the entire cost for 1291, and to recover the costs of the suit and subsequent profits and interest.

The Respondents were members of the same family, enjoyed the village in shares, and were the principal Defendants.

The facts are stated in the judgment of their Lordships.

The Subordinate Judge decreed in favour of the Appellant for possession of the village. He found that the village of *Chetanapalli* was granted as a permanent inam to *Pidaparti* in 1797 by

* *Present*:—LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD COUCH.

Naraina Gajapati Raz; that in 1802 the village of *Malliada* was given by the same grantor to the same grantee in lieu of *Chetanapalli;* and that in 1811 *Buradapeta* was given in lieu of *Malliada.* He also found that *Buradapeta* was at the permanent settlement included in the assets of the *Vizianagram* zemindar; that the estate in the hands of *Naraina Gajapati* was ancestral and not self-acquired; that the cowle of 1850 was true; that the arrangements alleged to have been entered into in 1863 between the late Maharajah and the other representatives of the *Pidaparti* family were true and binding on the present members of the family; that *Naraina Gajapati's* grant in 1811 was not binding on the Plaintiff, that it came to an end in 1845, that the grant of 1863 was a new grant, that it was resumable at will, and that whether permanent or resumable at will it was not binding on the Plaintiff, who accordingly was entitled to bring this suit which was not barred by limitation, the cause of action having arisen in 1879, the date of the death of the Plaintiff's father.

The High Court, on the other hand, held as follows:—

"The Maharajah, by whom the arrangement was made in 1863, died in 1879, and was succeeded by the Respondent. In 1881 the Respondent called on the Appellants to execute fresh engagements, undertaking to pay such rents as he might fix, and, on their refusal, notice was given them in February, 1881, to quit the village on the 1st of July, 1881. The Appellants having neglected to comply with the notice, this suit has been brought for their eviction. The Subordinate Judge holds that the inamdars were not in possession in virtue of their inam right from 1853–1863, that in 1863 a new grant was made to them, and that, in view of their pleadings in the mortgage suit, they are not entitled to deny that it was a new grant. He also holds that the new grant was resumable at pleasure; that, if it was not so resumable, it was not made for any of the purposes recognised by Hindu law and the zemindary regulations as rendering it binding on the zemindar's successors; and that, if the original grant subsisted after 1863, the position of the Respondent similarly to that of the zamorin entitled him to repudiate grants made by his predecessor, unless it was shewn that such grants were made for the benefit and improvement of the estate.

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"We may deal first with the last reason assigned by the Subordinate Judge in support of his decision. The Maharajah is a nobleman whose family, prior to the introduction of British rule, no doubt exercised from time to time certain rights of sovereignty over more or less extensive territories. On the introduction of British rule, the sovereignty over the territory in which the estate of the Maharajah's ancestors were situated passed to the Crown. The difference between the Respondent and the zamorin is that the personal law of the former is Hindu and the latter Malayalam, and even under the Malayalam law the zamorin would not be entitled to dispute grants made by his predecessors to which, if originally invalid, the holders had acquired a prescriptive title. This case falls to be decided in reference to the personal law of the parties—that is the Hindu law and the Common and Statute Law of *British India.*

"We may next dispose of the contention that the Appellants, in view of their pleadings in 1866, have no right to assert that the arrangement in 1863 was other than they then alleged it to have been. The Subordinate Judge appears to have considered, though he does not say it distinctly, that the Appellants are estopped from so doing. The allegations made by the Appellants in 1866, in a suit to which the Respondent was not a party, may no doubt be used as evidence of admissions made by the Appellants, but they do not estop them from asserting as against the Respondent that these admissions were inaccurate. We are, then, at liberty to consider what was the real nature of the arrangement in 1863. On this point, with all respect for the opinion of the learned Judges who decided the Appeal R. A. 22 of 1869, we find ourselves unable to agree with the view they expressed. The inams had been arbitrarily attached as resumable in 1845 under a misapprehension of the law. The right of resumption was questioned; the revenues of the inams had been applied to satisfy the arrears of revenue due on the zemindary, on the understanding that the amount appropriated would be repaid if the attachment was released. In 1853 a temporary concession was made to the mamdars, with which they were not satisfied: the village was still held zuft, or attached, pending the settlement of the dispute, until in 1863 the Maharajah finally came to an arrangement with

the inamdars. Reading the petitions and orders together, it appears that the inamdars on their part offered, not indeed to forego their claim on the misappropriated income, but to consent that it should be set off against such gifts as were ordinarily made to noblemen in *India* by their tenants and dependants, and to pay an increased quit-rent, and this surrender of rights asserted by them they offered on condition that the grant should be reinstated.

"They subsequently offered to pay quit-rent at the rate at which it had been paid from 1853 to 1863, and there can be little doubt this was the result of a negotiation. Possibly the inamdars were influenced to offer these terms by reason that a decision, unfavourable to certain grantees in the same zemindary, had been then recently pronounced on an erroneous view of Regulation XXV. of 1802.

"On the other hand, the late Maharajah, reciting the grant by his father and the attachment of the village and the terms of the adjustment at which the parties had arrived, accepted the terms offered and directed his officer to put the zuft lands in possession of the inamdars,—in other words, to take off the attachment which had so long subsisted, for the lands were at the time in the possession of the inamdars or of their tenants. It is true that in accordance with a common practice in this country the applications were made by the leading members only of the two branches of the family of the original inamdar; but it would be unsafe to infer from this circumstance that the right was recognised as abiding only in the Petitioners, or that it was intended that they, and not the other members of their respective families, should be benefited. The terms "be bound to obey the orders of the circa," from which the Subordinate Judge infers a tenancy at will, are no more than the common words in which a tenant professes his respect for his superior lord.

"It is noticeable as suggesting that the zemindar's agents may have had some part in negotiations before the presentation of the first petitions in 1863, that both in those petitions and in the Maharajah's orders the grant of *Buradapeta* is expressly declared to have been made after the permanent settlement. It has now been shewn that the grant in 1811 was but an exchange of lands

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for lands granted in February, 1802, and the grant of 1802 an exchange for lands granted in 1797 and 1800, so that the right to resume might fairly have been questioned even on the view then taken of the regulation. However this may be, it cannot be denied that the parties to the documents of 1863 intended thereby to effect a settlement of the then long pending dispute, and we feel constrained to hold, on the construction of those documents, that the arrangement resulted in a confirmation of the original grant, on terms more favourable to the zemindar. If, however, the arrangement is to be regarded as a new grant, construing the documents in the light of surrounding circumstances, we hold that it was intended to be the grant of an estate in all respects, save the amount of quit-rent, similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity. Such an arrangement, made by a Hindu father to put an end to a *bonâ fide* dispute would be equally binding on a Hindu son, whether the estate of which the land granted formed part, was of the tenure known as raj or an ordinary tenure. The appeal must be decreed, the decree of the Court of first instance reversed, and suit dismissed with costs."

Mayne, and *Johnstone*, for the Appellant, said that the questions to be decided were (1) whether as between the grantor and grantee in 1863 the High Court had put a correct construction on the transaction; (2), if the transaction amounted to a new lease, whether the same would be binding on the grantor's son, the Appellant, who was then in existence, and had a vested interest under the Mitakshara in the property dealt with. They contended that the grants of 1797, 1802 and 1811, were not "pious" grants nor binding on the successors of the grantor. And the effect of the transactions 1845–1863, beginning with the Collector taking possession, had brought the grant of 1811 to an end, partly by the law of estoppel, partly otherwise. As regards the transaction in 1863 they contended that those grants were not made by way of compromise, nor were they intended to be, nor were they, regrants of the village in question on the terms of the prior grants. They were made and accepted as new grants of a purely voluntary nature for purposes not binding on the

estate. Whether, however, they were intended to be a new grant of an estate, or a regrant on more favourable terms of the zemindar, still they could not have been intended to convey any larger estate than the grantor was legally capable of transferring. The grantor's son, the present Appellant, was living at the time, and did not assent to the transactions. They were therefore not binding upon him under the Mitakshara law, and his interest, which was a vested one, did not pass. Even if binding upon the Appellant, they on their true construction created no more than a tenancy at will in favour of the Respondents. [Reference was made to *Madras* Regulation XXV. of 1802, sect. 3; *Mussumat Bilasmoni Dasi* v. *Rajah Sheo Pershad Singh* (1).]

The Respondents did not appear.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this case is whether the Respondents are entitled to hold the village of *Buradapeta*, in the principality of the Appellant, as tenants in perpetuity at a rent of Rs.253. 6*a*. 7*p*., under a grant made by the Appellant's father in 1863, a suit to recover the village having been brought by the Appellant on the ground that he had, after his father's death, determined the tenancy by a notice to quit. The facts of the case, as proved by the evidence in the suit, are stated in the judgment of the High Court.

In 1794 *Visiaram Raz Pusapati*, zemindar of *Vizianagram*, the ancestor of the Appellant, took up arms against the Government, and was defeated and slain at *Padmanabham*. His son *Naraina Gajapati*, then a youth of sixteen years of age, fled to the hills; but in 1797 came in and surrendered himself, and on payment of a heavy fine was allowed to resume possession of his raj. Probably, out of his gratitude for his good fortune, *Naraina Gajapati* at once created several inams in favour of Brahmins and his dependants. Among others one *Pidaparti Sitaram Sastri*, the ancestor of the Respondents, received in 1797 a lease, expressed in the terms of a pious gift, of certain lands at *Chetanapalli* to be

(1) Law Rep. 9 Ind. App. 33, 38, 40.

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held by him and his heirs from generation to generation, subject to an annual quit-rent of Rs.50, and in 1800 the same grantee also received other lands in the same village to be held with the lands formerly granted on payment of a quit-rent increased by Rs.100, which was reduced shortly afterwards to the extent of Rs.50.

In 1802 the Permanent Settlement was introduced, and the villages of *Chetanapalli*, *Malliada*, and *Buradapeta* were included in the assets of the zemindari.

Early in 1802 *Naraina Gajapati Raz* conferred on *Sitaram* lands in *Malliada* in lieu of those held by him in *Chetanapalli*, and in 1811 he conferred on him the village of *Buradapeta*, to be held in lieu of the lands in *Malliada* at a quit-rent of Rs.45 by the grantee and his heirs from generation to generation "for the satisfaction of Sri," the expression usual in cases of pious gift.

On *Sitaram's* death, his sons *Seshadri* and *Appayya* made a partition of the village in March 1842, and, to discharge outstanding debts due by the family, each of the brothers made a usufructuary mortgage of his share for Rs.4,000 to the Durivars. *Naraina Gajapati Raz* was unable to live within his means, and, on more than one occasion, it was necessary for the Government to take charge of his revenues. Eventually he died at *Benares* leaving large debts.

At that time, owing to a misconception of a provision in the regulations which was intended for the security of the land revenue, it was believed by some officers that grants made by a zemindar were generally resumable by his successor.

It appears from proceedings of the Government, dated 30th of January 1853, that on receipt of the news of *Naraina Gajapati Raz's* death, "the Board of Revenue directed the Governor's agent, who was in charge of the zemindary, to adopt all measures in regard to resumptions of inams and shrotriems to which it would be legal and proper for the late Rajah's successor to have recourse," and that the agent, in anticipation of such instructions, had already issued orders for the attachment of all lands conferred by the late Rajah subsequently to the permanent settlement, whether agraharams (grants made to Brahmins), mokhasas, or other inams. It also appears that in 1848 the agent "requested

permission to employ the collections derived from the attached lands for the liquidation of the public debt of the zemindary, and offered suggestions for the settlement of the claims of the ousted inamdars," and "that the Government while considering this money available for the purpose agreed with the Board of Revenue that the claims of the parties who had been dispossessed called for further inquiry, and only permitted the agent to employ the collections as a present recourse on the distinct understanding that the sums appertaining to such of the inams as might be eventually restored should be repaid from the zemindar's treasury." It further appears that it was reported to the Government in 1852 that the lands attached in 1845 consisted of 87 villages and 184 detached plots bearing a gross assessment of Rs.83,312, from which sum quit-rents of Rs.6,839 being deducted, a sum of Rs.76,473 represented the net income of which the grantees were deprived. It was also reported that the zemindar wished to resume the whole of the lands attached indiscriminately, and to grant compensation in certain cases by money allowances, and that the collections derived from the attached lands up to the end of F. 1261 (1851–52) amounted to 3 lacs, of which Rs.2,40,000 had been devoted to the liquidation of the public debt.

The condition of the dispossessed mokhasadars and inamdars, in the opinion of the Commissioner for the Northern Circars, Mr. *Walter Elliot*, demanded great consideration, and, while he believed the zemindar was empowered, under Regulation XXV. of 1802, sect. 3, to resume lands alienated by his father, he urged him to deal liberally with the inamdars. The Governor in Council, in Minutes of Consultation recorded on Mr. *Elliot's* report, said the Government felt "themselves bound to express their disapproval of resumptions and the substitutions of money allowances (except with the full consent of parties interested) when there has been long possession such as gives all persons a legal title by prescription. It would be an injustice such as they could not sanction where such prescriptive right as is recognised by Hindu law may have been in existence by an unquestioned and undisturbed enjoyment for many generations. The Governor in Council could not view such resumption as other than a spoliation, which should not be carried out, as interfering with

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the peace of the country for which the Government are responsible." The Governor in Council also expressed doubts as to the soundness of Mr. *Elliot's* opinion as to the effect of Regulation XXV. of 1802, sect. 3, and intimated that the true construction of the regulation was probably that which has been since adopted by this Committee, namely, that it imposed restrictions on alienations only to secure the interests of the public revenue, and that the zemindar would have no power to disturb grants, otherwise valid, made by his predecessor, or titles to inams acquired by prescription. Considering the prompt and liberal settlement of the claims of the dispossessed grantees essential to the tranquillity of the country, and having been informed that the zemindar was willing to abide by the opinion of the Government, the Governor in Council desired the Commissioner and Special Agent at *Vizagapatam* to consider themselves empowered to use the name and authority of the Government in impressing upon him the absolute necessity of at once entering into a liberal and just settlement of all the claims. It was ordered that the views entertained by the Government should be communicated to the zemindar.

It appears that in 1850, during the dispossession, *Appayya*, one of the sons of *Sitaram*, took a lease of *Buradapeta* for three years at an annual rent of Rs.650. On the termination of this lease, the late Maharajah directed his agent to collect from the *Buradapeta* ryots the quit-rents then existing, and a quarter of the *Gudikattu* dowle (the entire assessment), and payments were made on that footing up to 1863, the village still being regarded as attached. The dispute relating to the propriety of the resumption was still subsisting, and it seems probable that a settlement was delayed by the provision which, in 1847, the Government had made for the protection of the inamdars, that the income of any inam appropriated for the liquidation of arrears of revenue in the zemindary should be repaid from the treasury of the zemindar on the restoration of the inam.

However this may be, in 1863 the eldest sons of *Seshadri* and *Appayya* each presented to the late Maharajah a petition respecting the moiety of the village which had fallen to his branch of the family in the following terms:—

"Darkast (application) presented by *Pidaparti Surianarayana*, Agraharamdar of *Buradapeta*, alias *Lakshminarainapuram Agraharam* attached to *Vizianagaram Tana*.

"The said village which was granted to my paternal grandfather, *Pidaparti Sitarama Sastrulu*, by *Sri Naraina Gajapati Razu Maharazulungaru* subsequent to the settlement, having been after (the time of) the donor attached by the then Collector, still continues under attachment. The same not having been as yet released from attachment, I have been suffering much.

"I therefore humbly submit as follows:—

"In the event of your Highness being graciously pleased to take all the money collected from the said agraharam during its attachment up to the end of Fusli 1272 on account of your installation and other nazirs (presents), and to grant me my share of lands in that agraharam from Fusli 1273, I shall pay the kattubadi fixed by your Highness and enjoy the remaining income, and be bound by the Circar orders.

"I, therefore, pray that your Highness will be graciously pleased to restore the said agraharam and protect (me).

"18th of July, 1863."

Upon these petitions, the Maharajah issued an order to each of the Petitioners which differed only in the amount of the rent. In one, it was Rs.115. 3*a*., and in the other Rs.138. 3*a*. 7*p*., the total rent of the village being Rs.253. 3*a*. 7*p*. instead of Rs.45 under the grant made in 1811. The order is as follows:—

"*Buradapeta*, alias *Lakshminarayanapuram Agraharam*, attached to *Vizianagaram Tana* which was favoured by our father subsequent to the settlement being under attachment, it was settled that you should for the four and a half vruttis of land in your holding in that village pay, out of Rs.691 3*a*, being the gudikattu dowle (the entire revenue) thereof, Rs.115 3*a*. inclusive of Rs.22½ kattubadi in existence prior to the attachment, and enjoy the remaining income, and that the said village should be placed under the head of zuft villages. While such state of things continued, you submitted to our Huzur on the 18th instant, a sannad (petition) requesting among other matters that the land might be restored to you, the said amount itself being

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fixed as kattubadi, and that you will continue to enjoy the said four and a half vruttis of land, paying every year the said kattubadi, and be bound by the Circar orders. Being moved to shew you favour, we have issued orders this day to the Tana Amin to put the attached lands in your possession from the current Fusli 1273, subject to the kattubadi of Rs.115 3*a*. (rupees one hundred and fifteen and annas three). You shall accordingly take possession, pay the said kattubadi of Rs.115 3*a*. duly every year, and be bound by the Circar orders."

Thereupon each of the Petitioners executed sanads engaging to pay the rent and "act up to the orders of the Circar," and they were put in possession of the village.

The Maharajah died in 1879, and was succeeded by the Appellant. In 1881 the Appellant called on the Respondents to execute fresh engagements, undertaking to pay such rent as he might fix, and on their refusal notice was given them to quit the village on the 1st of July, 1881, which they refused to do.

Before stating their opinion on the main question, their Lordships will dispose of another question which was raised. In 1866 the *Darivar* mortgagees sued the inamdars to enforce the mortgages executed in 1842. The inamdars pleaded that the mortgaged lands having been resumed in 1845 by the Collector, the original right possessed by them therein and the mortgage lien of the Plaintiffs thereon had ceased to exist. The suit was dismissed by the First Court, and their decree was affirmed on appeal. As the Maharajah was not a party to the suit, this plea does not operate as an estoppel, but is only an admission and not conclusive. This was so held in the present suit by the High Court, which then proceeded to consider the real nature of the arrangement in 1863, and held that it resulted in a confirmation of the original grant on terms more favourable to the zemindar, that if the arrangement was to be regarded as a new grant, it was intended to be the grant of an estate in all respects save the amount of quit-rent similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity.

Their Lordships think the latter is the correct view, but the difference is not material in this suit, where the question is whether the tenancy could be determined by the notice to quit.

The circumstances under which the applications to the Maharajah and his reply were made are to be considered. He was, doubtless, aware of the opinion of the Government. The inamdars had not relinquished their rights under the grant of 1811. The effect of the attachment in 1845 and the subsequent transactions was at least doubtful, and the inamdars had a claim to have the collections repaid to them from the zemindar's treasury. In the application to the Maharajah, the applicant is described as Agraharamdar of *Buradapeta*, and it is proposed that the Maharajah shall take all the money collected during the attachment on account of his installation and other presents. It is prayed that he will be pleased to restore the said agraharam. This meant more than becoming yearly tenants, and when the Maharajah replied that they were to take possession, and ordered it to be given to them, he, in their Lordships' opinion, intended that they should hold the agraharam at the increased rent, in the same manner as they had done before the attachment. And it was admitted by the Appellant's counsel that the Maharajah had power to do this. Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and to affirm the decree of the High Court dismissing the suit.

Solicitor for Appellant: *R. T. Tasker.*

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RAE SARABJIT SINGH . . . . . PLAINTIFF;

AND

CHAPMAN . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH

Act XXXV. of 1858, sect. 9—Court of Wards—Order of Court appointing a Manager not necessary.

Under sect. 9 of Act XXXV. of 1858 (which applies to *Oudh*), the Court of Wards is authorized to take charge of the property of an adjudged lunatic as therein directed without any order of Court in that behalf.

Where the Court made an order appointing as manager of the lunatic's property the same person who acts as manager under the Court of Wards, *held*, that a lease for more than five years granted by such manager was valid as being within the powers of the Court of Wards, though under sect. 14 of the Act it was *ultrà vires* of a manager appointed by the Court.

APPEAL from a decree of the Judicial Commissioner (Sept. 19, 1883) confirming a decree of the District Judge of *Rae Bareli* (Sept. 19 1882), and dismissing the Appellant's suit with costs.

The suit was for a declaration that a lease for twenty-five years of certain villages in the Plaintiff's estate was null and void; and for possession of the said villages with mesne profits from the Respondent, as being unlawfully held by him under such void lease after due notice to quit.

The Courts below concurrently held that the Appellant ratified and confirmed the lease, and was also estopped from questioning its validity. The first Court held that it was originally valid, the second that it was invalid.

Graham, Q.C., and *Mayne*, for the Appellant.

Cowie, Q.C., and *Doyne*, for the Respondent.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

Their Lordships think that the decision of the Court below, which has been appealed against, was the right decision, but they do not agree exactly with the reasons given below.

* *Present*:—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

Their Lordships have first to consider what point is raised by this case. The talookdar who owned the property in question became a lunatic, and an application was duly made for an inquiry into the state of his health under the 3rd section of Act XXXV. of 1858. That application was made by the officer of the district where this talook was situated, and the Civil Court to which the application was made having caused notice to be given, did enter into an inquiry, and the result was that the talookdar was adjudged to be a lunatic. Thereupon the 9th section of Act XXXV. of 1858 applied, which provides that:—"When a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consist of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorized to take charge of the same." At the time Act XXXV. of 1858 was passed, *Oudh* was not part of the British dominions, but it has become so since, and their Lordships take it that the Court of Wards may be considered as having the same jurisdiction and all the powers that the Court of Wards elsewhere would have had. Therefore, under section 9, the Court of Wards was authorized "to take charge of the same." It seems to have been rather hastily concluded by the Judge below that the Court of Wards being authorized by the Legislature "to take charge of the same," required some further order from the Civil Court which adjudged the talookdar to be a lunatic to justify them in acting. Their Lordships think there is no ground for saying that, though section 9 goes on to provide:—"In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate."

It appears that the Civil Court, when they declared the talookdar to be a lunatic and so authorized the Court of Wards in *Oudh* to manage his property, did contemporaneously make an order appointing as the manager of the property the same person who acts as the manager under the Court of Wards. In the 14th section of the Act there is a provision that—"Every manager of the estate of a lunatic appointed as aforesaid," that is a manager appointed, not the Court of Wards, "may exercise the

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same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic; but no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immoveable property for any period exceeding five years." Their Lordships suppose that the object of this order probably was that the Court thought *ex majore cautela* "if there is any ambiguity about it we will take care that the Court of Wards has double power, and the manager shall act both under this Court and the Court of Wards." It may not have been judicious, but that is the utmost object the Court could have had, and if it was wrong it will not be a bit the worse.

Such being the case, the Court of Wards did enter into possession of the estate and the management of it. The lunatic continued to live till 1874, when a lease was granted, the details of which need not be further stated than to say that it was a lease for twenty-five years with various terms and provisions in it. It professes to be a lease of certain villages belonging to the *Bhadri* estate under the Court of Wards which was granted to Captain *F. C. Chapman*, with the sanction of the Chief Commissioner of *Oudh*, conveyed in a letter of the 2nd of April, 1874, to the Subordinate Commissioner. Their Lordships pause to ask, what objection is there to this lease? No attempt is made to shew that it was a lease improper in its terms, or that there was anything that amounted to an imposition, or that it was obtained by fraud or obtained improperly; but the one point relied upon against the lease is that it could not be granted for more than five years, and that objection, whatever might be its importance if the lease had been granted by one acting only under the authority of an appointment as manager by the Civil Court, does not seem to apply to a lease granted by the Court of Wards. That is the objection on which it is sought to set the lease aside.

The Judge of first instance entered into a great many questions which their Lordships do not pretend to follow; but there are a great many allegations to shew that even if the lease was originally void if granted for more than five years, it had been made

good by subsequent acts after the lunatic was dead, and the present Appellant (the Plaintiff in the suit) had come into enjoyment of the estate. Their Lordships do not propose to enter into those questions at all, because they do not arise unless it can be shewn that the objection that the lease exceeded a term of five years applies and it certainly seems to their Lordships that it does not. The Judicial Commissioner on appeal arrived at the same result, that the lease was good, by a different process of reasoning, for he held that there were various things, by estoppel and otherwise, which prevented the Plaintiff from setting aside an invalid lease. Their Lordships would require a good deal more thought and consideration than has yet been given to the case before they pronounced an opinion upon such a point as that; but if it be correct to say, as their Lordships are decidedly of opinion that it is, that the Court of Wards could grant such a lease as this, and that it was not impeachable merely because it exceeded five years in length, no other objection being made, this lease is good and nothing further arises upon it. The lease was not void and could not be set aside, and consequently it stands. If there were other objections than this they have not been raised. Their Lordships do not suppose there are any, and they therefore think that the judgment appealed from should be affirmed, although not for the same reasons by any means that were given below.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed and this appeal dismissed with costs.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondent: *Sanderson & Hollands.*

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NAN KARAY PHAW AND OTHERS . . . PLAINTIFFS;

AND

KO HTAW AH . . . . . DEFENDANT.

AND CROSS APPEAL AND

KO HTAW AH AND ANOTHER . . . . . DEFENDANTS.

AND

NAN KARAY PHAW AND OTHERS . . . PLAINTIFFS.

ON APPEAL FROM THE SPECIAL COURT OF BRITISH BURMAH.

Practice—Suit for Account—Set-off.

In a suit for an account of sales of timber by the Defendant on behalf of the Plaintiff, *held*, on the evidence, that the Plaintiff had failed to prove the contracts upon which she sued.

Quære, whether a set-off could be pleaded against such a claim, but no issue having been raised or applied for in regard to it, the cross appeal was dismissed.

CONSOLIDATED appeals and cross appeal from decrees of the Special Court of *British Burmah* (Feb. 28 and Aug. 8, 1883) respectively reversing and confirming two decrees, dated the 24th of April, 1882, made by the Judge of *Moulmein*, in two suits referred to in the judgment of their Lordships as the "timber case" and the "elephant [illegible]." Both the suits were brought by the Appellants in the fi[illegible] The [illegible]tion at issue arose out of certain business trans[illegible] deceased and *Ko Htaw Ah*, in respect of t[illegible] side, and denied on the other, to have [illegible] and in respect of certain elephants employed in [illegible] of the said timber as was got in the forest of *Mei Nget*.

The facts appear in the judgment of their Lordships.

Doyne, and *Agabeg*, for the Appellants.

Scoble, Q.C., and *Phillips*, for the Respondents.

* *Present*:—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

With regard to the question of set-off Act X. of 1877, ss. 111, 216, and *Hayatka* v. *Abdulakha* (1) were referred to.

Feb. 16. The judgment of their Lordships was delivered by

LORD MONKSWELL:—

These are two appeals from judgments of the Special Court of *British Burmah*, in both of which the widow and children of one *Phatadah* were Plaintiffs, and *Ko Htaw Ah*, a Burmese merchant, was Defendant, in the second case an agent of his being joined as a co-Defendant with him. In the first case, which may be conveniently called the "timber case," the Court of *Moulmein* gave judgment for the Plaintiffs. That judgment was reversed by the Special Court of *British Burmah*, by which judgment was given for the Defendant and the suit dismissed. From this judgment the Plaintiff appeals, and there is a cross appeal by the Defendant on the ground that he has a cross claim which makes *Phatadah* to have been his debtor. In the second case, which may be called the "elephant case," both Courts concurred in finding for the Plaintiff, and the Defendant only appeals.

It will be convenient to deal with the cases separately; but in order to make them intelligible a short statement is necessary.

On the banks of the *Salween* river and its tributaries are extensive forests, partly, it would appear, in the Burmese territory and partly in the territory of a neighbouring semi-barbarous tribe called the Karens. A large timber trade is carried on in these forests, timber being cut and, as it is called, ounged—that is, dragged or pushed by elephants into the creeks or adjoining rivers and streams, and left to find its way, apparently without assistance, down to *Moulmein*. Near *Moulmein* there is a station called *Kadoe*, where the timber is intercepted, chiefly for the purpose of the revenue being collected upon it; and it appears that Burmese merchants who were in the habit of buying timber from the Karens (the Karens for the most part confining their operations to the forests), or employing the Karens to cut timber for them, and of sending it to float down to *Kadoe*, used certain marks for its identification, which marks were registered by a

(1) 6 Bombay H. C. R. 151

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Government official at *Kadoe* It has not been very distinctly explained what the regulations were under which those marks were registered, but their Lordships collect (what appears to be sufficient for the present purpose) that the existence of the mark of a merchant on timber was sufficient *primâ facie* to constitute some title on his part to it, and also some title of the Government to be paid revenue by him for it.

The late husband of the Plaintiff was a Karen. He seems to have been a leading man among the Karens, to have had some capital and a number of elephants, and before the transaction which forms the subject of this action, to have been in the habit of cutting timber in these forests and of selling it there. He was in no sense a merchant conveying timber from the forests to *Moulmein*, and he had consequently no registered mark. The Defendant is a timber merchant carrying on extensive transactions, having considerable capital, and the lessee of one of the forests in which the timber was felled which formed the subject of the action.

The plaint in the suit states the Plaintiff's cause of action clearly and succinctly. She says she is the widow of *Phatadah*, who died in 1879. "That in or about the year 1871 *Phatadah* entered into an agreement with the Defendant, whereby he was to send to *Moulmein* timber marked" with the "pin-byit" mark —which may be shortly described as three circles with crosses within them—"worked and purchased by him in the *Thoungyeen* forests, and Defendant was as *Phatadah's* agent, and for and on his behalf, to dispose of the same and render an account of the proceeds of the sales effected by him. That between July, 1871, and January, 1879, the Defendant received and entered at *Kadoe* 5226 logs of timber bearing the said mark, which he disposed of. That subsequently, that is to say, about six years ago, the said *Phatadah* agreed with the Defendant to work and send timber down from the *Mai Nget* forests to *Moulmein*, which timber was to be marked by him with the mark 'Ko Lan,' and that the Defendant should sell the same for *Phatadah* as his agent and account for the proceeds of the sales effected by him. That between November, 1879, and July, 1880, the Defendant received and entered at *Kadoe* 1183 logs of timber bearing the said mark,

and disposed of the same." The plaint then states that the Defendant paid *Phatadah* Rs.30,000 on account, but that he has rendered no account of the sales. Then the plaint prays for an account of the sales against the Defendant.

The Defendant in his written statement denies having entered into either of the alleged agreements. He says that the "pin-byit" mark is his own, but registered by him in his son's name, and that the timber which came from the *Thoungyeen* forest was his own, purchased by him there out of his own moneys. He further says that "with regard to the timber marked Ko Lan (which is the Defendant's own registered hammer mark), Defendant begs to state that in the year 1238 *Phatadah*, who had for several years previously been working on his own account in the *Maipain* forests, came to him and asked him to assist him with some money to buy elephants, and to permit him to work in the *Mai Nget* forests. That in accordance with his request Defendant lent him Rs.17,555 on the understanding that he should work for Defendant in the *Mai Nget* forests on the following terms:—*Phatadah* was to cut and oung with his elephants as much timber as he could, and make it over to Defendant in the *Salween* river, at the rate of Rs.17 per log for full-sized logs, and Rs.5 for under-sized logs, Defendant paying the revenue due to the Chief of *Zimmay* on all timber so delivered. *Phatadah* was, in accordance with the prevailing custom of foresters working in other people's forests, not to remove his elephants from the *Mai Nget* forests as long as he was indebted to the Defendant." The plea then states that in accordance with the above arrangement *Phatadah* worked in the Defendant's forests until his death, during which time he took several further advances from the Defendant; and that at the time of his death *Phatadah* was indebted to Defendant in the sum of Rs.40,234, which with further payments and interests amounted to a cross claim of Rs.55,360 against the estate of *Phatadah*.

The evidence was extremely conflicting and unsatisfactory. Their Lordships think that no good purpose would be served by going through it in detail, and it will be enough to indicate some of its leading features. The Plaintiff, the widow, speaks of the original contract in these terms. After saying that her

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husband was a head man among the Karens, she says: "I know the Defendant; he came to my house at *May Too* village twelve years ago. He entered into an arrangement with my husband as follows: 'Let us form friendship and drink each other's blood.'" It seems that there is a custom among the Karens, if they make a solemn contract, for each party to drink the blood of the other. "The Defendant told the deceased to cut down timber and send it to *Moulmein*, and he, that is Defendant, would sell it. Defendant said, 'Friend, this is your mark' (exhibit A., a marked hammer, identified). Defendant produced this and gave it to *Phatadah*. My husband worked timber after Defendant went up for five years at *Thoungyeen*. He came down to *Tsin-yo*." Then she says, "After arrival at *Tsin-yo* I came with my husband to *Kaw Nhat*, where Defendant was residing, to ask for the price of the 6000 logs of timber sent down from *Thoungyeen*." It is represented by this lady and several of the witnesses that *Phatadah* sent down as many as 6000 logs of timber from *Thoungyeen*. Then she says:—"The Defendant said, 'Friend, do not be alarmed about the money; keep it here until you build a substantial house.'" Then she speaks of the second contract about working timber at *Mai Nget*. "My husband said he was getting old and could not do it. Defendant said, 'You are acquainted with the Karens, and if you work timber can be obtained.' *Phatadah* was to send down the timber; Defendant was to sell it and pay him. I was present and heard this. My husband was present and went up to the *Mai Nget* forests. He never got any money from Defendant," and so on. She also says in her evidence that *Phatadah* was to become security, with the other Karens, for the Defendant; and that that was the consideration on which the Defendant agreed to act for him. She says, subsequently, in respect of the second contract:—"The Defendant agreed to sell *Phatadah's* timber at the second agreement out of gratitude, as he had stood security for him." She calls four coolies, all of whom declare themselves to have been present on this occasion, and to have witnessed the drinking of the blood, and all of whom speak in substance, though somewhat vaguely, of the transaction, namely that *Phatadah* was to cut timber and send it down, and that the Defendant was to sell it for him in consideration of

friendship, and of his having gone security for him with certain Karens. It may be observed that there is no proof in the case of his having gone security, whatever that expression may mean.

It may be observed here that, according to this lady's evidence, herself and a number of her witnesses were entertained by a person of the name of *Ma Buin*, a rich lady, who seems to have maintained the suit, the Defendant suggests out of illwill to him on account of his having obtained possession of a forest which she wanted; and there also seems to have been some written agreement between the widow and her witnesses that in the event of her succeeding in establishing her case they were all to receive something.

The coolies also speak of *Phatadah* having, during five or six years, sent down as many as 1000 logs a year; so that on the whole some 6000 logs of timber were sent down, according to their account, from the *Thoungyeen* forest to *Kadoe*, to be sold for the Plaintiff by the Defendant. There is also some further evidence to the effect that *Phatadah* bought some logs of timber, about 500, and that he put, or caused to be put, his "pin-byit" marks upon some timber which he sent down; further that he demanded payment of Defendant and was put off with excuses. Further, the hammer which is said to have been delivered to him by the Defendant is put in, by which it appears that although the circles remained, the crosses had been in a great measure intentionally defaced. That is in substance the case of the Plaintiff.

The Defendant denies the contracts. He admits that he received a large number of logs, amounting to 5000 in round numbers, at *Kadoe*, some bearing the "pin-byit" mark, and others bearing the mark of the circles without the crosses, *i.e.*, the "pin" mark only, and he accounts for it in this way. He says that he made an agreement in 1870 or 1871 with one *Tsit Paw*, a Karen (who is dead), to buy of him 3500 logs, and that he put this circle and cross mark upon all of those. He further says that upon the conclusion of his transaction with *Tsit Paw* he bought a number of other logs, some 1500, and afterwards some more, from *Ko Nan Gay*; and that in order to prevent confusion between his purchases from *Tsit Paw* and his purchases from *Ko*

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Nan Gay, he caused the crosses on all the hammers he had (he appears to have had several) to be obliterated. So that, according to his story, there ought to have arrived from *Tsit Paw* some 3500 logs with the "pin-byit" mark and *Tsit Paw's* mark; and there ought to have arrived from *Ko Nan Gay*, who had no mark of his own, a certain number with the pin mark without the cross. This is what happened. It seems from the record which is kept at *Kudoe* that 3318 logs with the "pin-byit" mark and *Tsit Paw's* mark arrived in the course of two or three years, which certainly is confirmatory of the Defendant's story, as far as it goes, and 1607, or somewhere about that number, came with the plain pin mark, together with some other marks which, though *Ko Nan Gay* had no mark of his own, might have been impressed upon them by persons with whom he dealt. This is also confirmatory of Defendant's story. He goes on to say that with respect to the subsequent alleged agreement in 1876 the forest of *Mai Nget* was his own; and he puts in his lease. He insists that it is highly improbable that he should have given *Phatadah* his own timber and consented only to act as agent for him. He says that what he really did was to employ *Phatadah* to cut and oung timber for him in his own *Mai Nget* forest; and that he made him a considerable advance—some Rs.17,000 odd—for the purpose of enabling him to do all that was necessary for that purpose. It should be said that with regard to the former alleged contract, having reference to the *Thoung-yin* forest, he said that he did employ *Phatadah* to oung 4000 logs at eight annas a log; he further says with respect to the *Mai Nget* forest that he made subsequent advances and that he got promissory notes for them. He maintains that *Phatadah* was largely in his debt.

The first question is whether the Plaintiff has proved her case. In the first place we have to deal with a supposed contract made twelve years before the trial, entirely by word of mouth, and on which the evidence is that of the Plaintiff herself and the coolies—evidence of a very loose description, which appears to their Lordships not satisfactory. Further, the contract alleged bears a great deal of improbability on the face of it. *Phatadah* was a Karen with some but not a large capital. Before this

transaction he had confined his dealings to cutting and selling timber in the forests. It does not seem very probable that he should have entered upon transactions of the magnitude alleged, whereby he sent down some 6000 logs, the price of which would far exceed a lac of rupees. Again it seems improbable that the Defendant, a merchant, and a considerable capitalist, should have consented to reverse positions with *Phatadah*, to make *Phatadah* the principal and himself the agent, and to agree to account to *Phatadah*. That becomes still more improbable when we consider that he is alleged to have done this without any commission such as would ordinarily be given on the sale of timber, but simply out of friendship—signified by the drinking of blood—and a supposed promise to become security which was not proved to have been performed.

It appears therefore to their Lordships, without going more in detail into the evidence, that on the whole the two contracts alleged by the Plaintiff—the first as to the *Thoungyeen* forest, and the second as to the *Mai Nget* forest—are not sufficiently proved. They regard the account which the Defendant gives of the transactions the more probable; and they may further observe that the production by the Plaintiff of the marked hammer, on which a great deal of reliance has been placed, seems to bear against her. The Defendant states that he obliterated the crosses, and why he did so; the hammer is shewn, and the crosses appear to be obliterated so far that though traces of them remain, they would not be sufficient to impress the cross mark upon timber. That would indicate that the hammer must have been in the possession of the Defendant for some time, and does not accord with the case of the Plaintiff that *Phatadah* continued in possession of it from the time of receiving it. The obliteration of the crosses agrees with the Defendant's account, and disagrees with that of the Plaintiff, who appears to have had no knowledge of the obliteration, and whose case is that all the timber which was sent down was marked with the full mark of the circles and the crosses, and with no other. On these grounds it appears to their Lordships that the Court of Appeal was right in holding that the Plaintiff had not proved her case.

With respect to the cross claim on the part of the Defendant,

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the first question which arises is whether it is admissible under the pleadings. The claim is not for the recovery of money, but for an account, and it is, at all events, doubtful whether a set-off could be pleaded in answer to such a claim. It must further be observed that no issue was framed or even applied for on this question. It appears to their Lordships, therefore, that it is not open to the Defendant to raise it. That being so, it is not necessary to go into the question of whether the alleged promissory notes are or are not genuine. Their Lordships, however, cannot help observing that the evidence of the cross claim is highly unsatisfactory.

For these reasons their Lordships will humbly advise Her Majesty in this case that the judgment of the special Court of *British Burmah* be affirmed, and that both appeals, the Plaintiff's appeal and the cross appeal be dismissed. The appeal will be dismissed with costs; and the cross-appeal without costs, save those which were incurred by *Nan Karay Phaw* in opposing the petition for special leave to enter a cross-appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the Defendant, certain elephants of *Phatadah* which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the Defendant for two years. The Defendant seeks to justify the detention of the elephants on the double ground, first of a contract with *Phatadah*, by which he was entitled to detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set-off has been pleaded in this case. The judgment therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Plaintiff: *Bramall & White.*
Solicitors for Defendants: *Sanderson & Holland.*

KUAR BALWANT SINGH . . . . . PLAINTIFF;

AND

KUAR DOULUT SINGH . . . . . DEFENDANT.

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1886
Feb. 17.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Practice—Restoration of Appeal after Dismissal—Civil Procedure Code, 1877, *ss.* 549, 556, 557, 558.

An appeal to the High Court having been struck off because security had not been filed, the Appellant, after obtaining leave, tendered security and prayed for the restoration of the appeal, but the High Court held that a petition to that effect was not entertainable under sect. 558 of the Code of 1877, since the order of dismissal had been made under sect. 549 and not under sects. 556 or 557:—

Held, that on security being given the appeal should be restored.

APPEAL by special leave from two orders of the High Court (June 26, 1882, and Aug. 14, 1882) and from subsequent orders refusing to re-admit the appeal.

The proceedings are stated in the judgment of their Lordships.

Doyne, and *Raikes*, for the Appellant, contended that the order of the 26th of June was wrong, no notice having been served on the Appellant. There was no case made for requiring security. The order of the 14th of August, made without considering the Appellant's petition of the 5th of August, was also wrong, so also was that of the 29th of November, 1882.

Cowie, Q.C., and *C. W. Arathoon*, for the Respondent, contended that the matter was one for the discretion of the High Court, that the Court rightly exercised it, and rightly refused to re-admit the appeal.

The counsel for the Appellant were not called on to reply.

* *Present*:—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This comes before their Lordships in rather a peculiar way, and there is some difficulty in saying what in substance is the proper course to be taken. It appears that the Appellant is seeking to recover property in the possession of the Respondent, and that being defeated before the Commissioner of *Jhansi*, he appealed to the High Court. The Respondent applied that the Appellant might give security for costs, and on the 3rd of June, 1882, the High Court made an order directing the Appellant to shew cause why the Respondent's petition should not be granted. That order to shew cause was not properly served upon the Appellant, and on the 26th of June the Appellant then, as it would seem, knowing nothing about the order, a further order was made by the High Court in these terms: "Appellant has not appeared, and he is hereby required to deposit security to the extent of Rs.2500 within six weeks from this date," viz., by the 8th of August. On the 5th of August the Appellant presented a petition shewing cause why he should not be ordered to give security, and on the 14th of August another order was made by the High Court. It is simply in these terms: "Security has not been filed within the time prescribed by the Court. The appeal is, therefore, of necessity struck off the file with costs." Whether the Court considered the merits of the cause then for the first time shewn by the Appellant, does not appear; but if they did, he was not allowed any time at all to tender his security. On the 9th of September the Appellant presented a petition in which he stated the non-service of the original order to shew cause of the 3rd of June, and his ignorance of it until he got information in time to file his petition on the 5th of August; and he prayed for the restoration of the appeal. It would seem that, on that petition, an order was made dated the 13th of September, 1882; but their Lordships cannot tell certainly upon what proceedings that order was made, nor can they do more than guess at the terms of it, for by some omission which is entirely unexplained that order has not been transmitted to this country. The direction given by Her Majesty on the petition for leave to appeal was that the High

Court should transmit the prior orders and also all subsequent orders relating to the refusal to restore the appeal, but for some reason or other this order has not been transmitted. The nature of it can only be gathered from a subsequent order which was made in this way. On the 27th of November, 1882, the Appellant again petitioned the High Court, and in that petition he states that "in obedience to the order of the Court, dated the 13th of September, 1882, the Petitioner submits herewith two security bonds for Rs.2500, as detailed below, and prays that proper order may be made for the restoration of the appeal to its original number of file." Therefore it would seem that by the order of the 13th of September the Court had held that the Appellant must give security, and had allowed time for the purpose. On the 27th of November he tenders the security, and asks that the proper order may be made for the restoration of the appeal. Upon that there comes an order of the 29th of November, which their Lordships have great difficulty in understanding. It is a very short one. It does not say on what petition or proceedings it was made except that it was on a petition of the Appellant. It does not state who appeared upon it. The whole of the order is this: "The Petitioner's appeal was not dismissed under sects. 556 or 557 of the Civil Procedure Code. This petition, therefore, is not entertainable under sect. 558 of that Code, and it is inapplicable to an order made, as ours was made, under sect. 549 of the Code." It is extremely difficult to apply the terms of this order to the petition of the 27th of November, and it is a matter now of uncertainty and dispute what petition the order speaks of and what order it speaks of. The effect of it is apparently to maintain in full force the order of the 14th of August, by which the appeal was struck off the file.

It appears to their Lordships that the case has never been fully considered by the High Court.

The question is, first, whether the Appellant should give security; and their Lordships assume that on the 13th of September he was ordered to give security after hearing him; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th of November,

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which was to restore after tendering security, was not entertainable and could not be listened to. Their Lordships will humbly advise Her Majesty to make an order that the Appellant may give security for the costs mentioned in the order of the 3rd of June, 1882, of such nature as shall be satisfactory to the High Court, and within such reasonable time as shall be fixed by that Court; and that upon his giving such security his appeal shall be restored to the files of that Court. There will be no costs of this appeal.

Solicitors for Appellant: *Oehme & Summerhays.*
Solicitor for Respondent: *T. L. Wilson.*

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March 31; *April* 1, 2, 6.

GAN KIM SWEE AND OTHERS . . . . DEFENDANTS;

AND

RALLI AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Breach of Warranty—Evidence—Onus Probandi.

In an action for damages for breach of warranties in contracts for the sale of good cutch, it appeared that the Respondents accepted the same after a searching examination thereof in *Calcutta*, but afterwards complained of the same when received in *New York* being not according to contract:—

Held, that the onus was upon the Respondents by very cogent evidence to rebut the inference that the cutch accepted in *Calcutta* was according to contract, and that in the absence of any evidence as to its treatment in *Calcutta*, or of its loading, or of the conditions of the voyage, the action must be dismissed.

APPEAL from a decree of the High Court (*Norris* and *Wilkinson*, JJ., Sept. 13, 1883), whereby Rs.113,066 with costs and interest were awarded to the Respondents as damages sustained by them in consequence of a breach of contract by the Appellants in respect of 9043 bags of cutch sold and delivered to them by the Appellants.

* *Present*:—LORD BLACKBURN, LORD HALSBURY, LORD HOBHOUSE, and SIR RICHARD COUCH.

The suit was part heard before one Judge, and afterwards, before material progress had been made therein, to save expense and avoid the necessity of an appeal to the High Court in its appellate jurisdiction, set down for hearing before a Division Bench of two Judges sitting in the exercise of ordinary original civil jurisdiction.

The facts of the case are stated in the judgment of their Lordships.

Cohen, Q.C., *Charles*, Q.C., and *Branson*, for the Appellants.

Cowie, Q.C., and *Doyne*, for the Respondents.

1886
April 6.

The judgment of their Lordships was delivered by

LORD HALSBURY :—

Their Lordships will not trouble you to reply, Mr. *Cohen*.

This is an appeal from the High Court at *Fort William* in *Bengal*, where judgment was given for the Respondents, the Plaintiffs below, with damages for the breach of warranties contained in five several contracts for the sale of cutch to the Respondents.

The course of the evidence in this case renders it unnecessary to draw any distinction between the first and the four later contracts. It is not denied that in all five contracts the obligation was to deliver good cutch, and the real dispute in this case is whether good cutch was delivered. Had the evidence raised any distinction between cutch of a peculiar manufacture or quality, as indicated by a recognised mark, it might have been necessary to consider more minutely the effect of the warranties contained in the four later contracts; but the contest between the parties has been conducted on much broader grounds. The 11,000 bags, the subject of the five contracts, were delivered in *Calcutta* between the 5th of April, 1879, and the 26th of April, 1880. In the course of the deliveries extending over this period an examination to determine whether it should be accepted as according to contract or not took place. Some was rejected, other cutch substituted, and extra allowance made for weight. This was done in the presence of one or other of the brokers and of the person

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selected by the purchasers, who made the examination and conducted the examination in the manner in which, at that time, cutch was generally examined. The correspondence between the Respondents and their *New York* agency at pages 184, *k.*, *l*, and *m.* discloses the fact that upon some telegrams and letters which are not before us, the Respondents explained to their agency why they had accepted some which, in their judgment, might not exactly have come up to the contract quality. At page 184 *k*, they say, "We had to reject several lots, receiving only what would pass as prime. We had to complain also in some instances about heavy tare, and we only received such lots with full allowance of weight." Then at page 184 *l*, in a letter dated June 22, 1880, they say, "As you are aware, we were all along receiving our cutch on advancing markets, and although we were very careful in receiving, in many instances we were compelled to accept deliveries which we would have rejected if our market was quiet, and we were not pressed by freight engagements." Then at the bottom of the page they say, "We may here add, that owing to the strong demonstrations and the rejections made by our competitors and ourselves, the quality and the packing of the supplies since February had improved, and we hope that on arrival you will find an improvement in our shipments." Then at page 184 *m*, line 9: "We are sorry of not having been aware of the objectionable form of your contracts for cutch, which do not admit of any allowances in case of inferiority of quality, as otherwise we would have certainly been much more particular in restricting our business to the very best marks. Being ignorant of this, and seeing our competitors (who had far better experience than ourselves in this article) buy the EG mark, we thought that by being careful in the delivery, and receiving full allowances for any inferiority in the quality or extra tare, we could protect ourselves and take our share in this business. On several occasions we have rejected lots for inferiority of quality or false packing (when we were not pressed for shipment), and the same lots have been accepted and shipped by our competitors, and this was an argument of our seller for our being very particular in our deliveries." Then at the bottom of the page they say again, in a letter dated the 30th of July: "After

the great disappointments we have had (which, however, have been partly caused by the fact that we were never aware of the clause in your contracts allowing the buyer to reject out-and-out any inferior quality) we shall of course be more careful in our deliveries and ship only really good quality."

It is to be observed that that correspondence, which obviously arises from some telegram not before us, had taken place between the parties before the end of April, 1880, and indeed the selected specimen on which so much turns, and which will have hereafter to be dealt with, was taken before the end of April, 1880, and throughout the course of delivery in *New York*, occupying from the 13th of April until the 21st of October, no complaint whatever is made of either quality or packing until the letter of the 4th of November. Mr. *Cowie* very fairly admitted that although that letter of the 4th of November refers to some communication by these persons, it refers to some verbal communication on or about that time, and the letter itself, when looked at, does not refer to inferiority of quality at all, but refers, apparently, to the question of false packing.

It probably is not necessary, upon this state of facts, and seeing what the course of delivery has been, to put any construction on the *Indian Contract Act*, since treating it as a matter simply of fact and inference, it is impossible not to see that the evidence of the searching examination at *Calcutta*, and the period which is allowed to elapse from the time, and during the course, of delivery, extending over the period referred to, renders it at all events incumbent, by very cogent evidence on the part of the Respondents, to rebut the inference which justly would be drawn from the acceptance in *Calcutta* after such searching examination that the goods delivered were according to contract.

Their Lordships are of opinion that the Judges of the High Court were right in rejecting the claim in respect of false packing. If the evidence of the condition of the cutch as received in *New York* was accurate, it is absolutely impossible to suppose that it could have escaped the examination at *Calcutta*. To take the one specimen which has been more than once referred to of a fraudulently packed bag—there is no other phrase that will adequately describe it—in which there were two or three inches

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of cutch outside and the interior filled with dirt and rubbish, and which has been referred to once or twice as a piece of evidence that it is impossible to reconcile with a really honest examination at *Calcutta*, it is worthy of remark that although a considerable quantity—and, as Mr. *Doyne* has pointed out in his argument, a very considerable number—of bags were rejected at *Calcutta*, it is not suggested in any part of the evidence that anything of that sort was discovered during the examination. It would almost have followed as a matter of course that if any such fraudulent trick as that had been discovered, the examination would have been much more stringent even than it was. But the Respondents took delivery after examination, and if they had sought to shew that the article as delivered in *New York* was the same in quality and condition as to packing as when it was received and accepted by them, they should have given some evidence (for the burden was clearly on them) of its treatment in *Calcutta* after delivery to them, its loading on board, the conditions of the voyage, and, further, have shewn that no changes of heat, moisture, or pressure by superincumbent weight, could have affected the article during the voyage until its delivery in *New York*. It is obvious that the Respondents have offered no evidence on any one of these questions, and it appears to their Lordships they have entirely failed to satisfy the burden which was upon them. But while their Lordships entirely agree with the Judges of the High Court in rejecting the claim as to false packing, they are unable to follow the learned Judges in their conclusion as to the inferior quality of the cutch. The judgment apparently depends upon the proposition that the cutch in its original manufacture contained an inordinate quantity of sandy or earthy matter; and that the condition of the cutch was incapable of being discovered in *Calcutta* upon the examination on account of the semi-liquid state of the cutch. Their Lordships are unable to discover any evidence to justify that finding. If indeed the evidence had established that the liquid state of the cutch at *Calcutta* had prevented examination, and upon its arrival at *New York* it disclosed that, as originally manufactured, it was defective, a different question might have arisen; but in truth there is hardly any evidence in support of this branch of the

proposition. Their Lordships fail to discover any evidence that the examination at *Calcutta* was prevented or even affected by the liquid condition of the cutch, and there is absolutely no evidence of the cutch being so manufactured that it contained an undue quantity of earthy or sandy matter. The learned Judges appear to have acted upon their own view of what was described by the sample marked "T 3," and they have regarded this sample, the size of which does not distinctly appear, but which appears to have been taken at the latter end of April, 1880, as having sufficiently informed their minds of what was the quality of the 11,000 bags of cutch. Their Lordships are wholly unable to acquiesce in the inference drawn, and therefore will humbly advise Her Majesty that the judgment of the High Court should be reversed, and the suit be decreed to be dismissed with costs, and the Respondents will pay the costs of this appeal.

Solicitors for Appellants: *Watkins & Lattey.*
Solicitors for Respondents: *Sanderson & Holland.*

J. C.
1886
March 31.

HARI RAVJI CHIPLUNKAR . . . . PLAINTIFF;

AND

SHAPURJI HORMUSJI AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Mortgagor and Mortgagee—Suit to redeem barred—Former Suit by Mortgagees —Act XXIII of 1861, *s.* 11.

Where in 1877 a mortgagor sued to redeem lands which had been included in a mortgage executed in 1806, but based his claim on a decree obtained by the mortgagees in 1825, under which an account had been taken of what was due under the mortgage, no date being fixed for redemption:—

Held, that redemption could only under Act XXIII of 1861, s 11, be effected under the said decree, and was barred, and that a fresh suit for the same purpose could not be brought The Plaintiff could not fall back, contrary to his plaint, on the mortgage of 1806, nor could he contend that limitation ran from the acknowledgment thereof, no issue to that effect having been raised

APPEAL from a decree of the High Court (August 2, 1882) affirming a decree of the Subordinate Judge of *Poona* (April 15, 1880), whereby the Appellant's suit to redeem from mortgage one and a half rukas of Maharki land in village *Mairyon* was dismissed.

The facts are stated in the judgment of their Lordships.

Both Courts were of opinion that the mortgage had merged in a decree which the mortgagee had obtained, which decree was made for the benefit of both parties to the mortgage, and that the execution of this decree was barred by Act XIV. of 1859; further, that the Appellant's suit was not maintainable, his proper course being that prescribed by sect. 11, Act XXIII. of 1861.

Scoble, Q.C., and *C. W. Arathoon*, for the Appellant. They referred to *Ravji Shivram Joshi* v. *Kaluram* (1).

The Respondents did not appear.

Present —LORD BLACKBURN, LORD HALSBURY, LORD HOBHOUSE, and SIR RICHARD COUCH

(1) 12 Bomb H C. R 160

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal from a decision of the High Court of *Bombay* confirming a decree of the Subordinate Judge, who held that the suit was barred by the operation of sect. 11 of Act XXIII. of 1861.

The suit was in form to redeem a mortgage, and the facts out of which it arose were that on the 25th of May, 1806, two persons, named *Narsoji* and *Nagoji*, mortgaged to two others, named *Bhavánji* and *Zánoji*, a quantity of land described as three rukas, each ruka containing about six acres, to secure an advance then made to the former. In fact *Narsoji* and *Nagoji* were themselves the mortgagees of the land from persons described in the proceedings as the Mahars; but that is not material now, because their title under the Mahars does not come into question, and for the purposes of this suit they may be treated as the owners of the land. A further advance was made in 1807 to *Narsoji* of Rs.500, the result being that the mortgage by *Narsoji* for the debt due by him exceeded the amount of the mortgage for which *Nagoji's* share was liable. In November, 1823, a suit was brought by *Bhavánji* and *Zánoji* against the heirs of the mortgagors, and a decree was made in that suit which it is necessary to notice particularly. The decree, which is dated the 8th of September, 1825, set out the mortgage of 1806, and the accounts which had been taken, the suit being brought to enforce the mortgage, and ordered the Defendants to pay in all Rs.2396 4*a*. 9*p*. to the Plaintiffs—treating the mortgage as a joint mortgage, and the whole sum as being due by both mortgagors—by the date fixed, and they were to redeem their Maharki field which they had mortgaged to the Plaintiffs. Then it says:—"Until the Defendants clear off the money the Plaintiffs should use and enjoy the field according to [the terms of] the agreement. On the day on which the Defendants will pay the money, the Plaintiffs should compute the interest on rupees, two thousand three hundred and ninety-six and a quarter, at the rate of one per cent. [per mensem] from the date [that will be] fixed; should deduct therefrom the amount of produce from the fixed date onwards; should receive

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the remaining amount, together with the interest, and should restore the field to the Defendants." Although this decree speaks about a date which will be fixed, no date was fixed by it, and the operation of the decree appears to have been that an account having been taken of what was due on the mortgage, the mortgagors might at any time make a tender of the amount due, with the interest up to that time, and require that the land should be restored to them.

Some time in 1837—the precise date is not very material—an application was made for the execution of this decree, and it resulted in *Yashwantrav*, the son and heir of *Narsoji*, one of the mortgagors, paying his share of the money due on the mortgage, whereupon, so far as regards the one-half of the land mortgaged in 1806 that belonged to *Narsoji*, the mortgage became redeemed; and the question in this suit relates to the other half, namely, that which was the property of *Nagoji*. Some other proceedings took place, the result being that the present Plaintiff represents the interest of the original mortgagors, and would be, if the suit were not barred by the operation of law, entitled to redeem the property, and the Defendants may be taken to represent the mortgagees.

The plaint in the present suit, which was filed on the 13th of September, 1877, begins by stating that the claim is a claim for redeeming from mortgage the under-mentioned land. It states the mortgage of 1806, and then sets out the proceedings in the suit in 1823, and the decree which was made in 1825, and after that it says:—"The cause of action accrued when in the decree mentioned above in the third paragraph the previous transaction 'merged,' [and] an order was made 'on the new basis' as to the way in which the mortgagees should carry on the management, &c.; that is to say, [it accrued] on the 8th of September, 1825." Then it proceeds to state that there were certain acknowledgments in writing of the mortgage made by the mortgagee.

The suit as framed, then, apparently treats this decree as in the nature of a fresh mortgage, and as regulating the rights of the parties from that time; and the reason for this appears to be that the law of limitation gave sixty years for a suit for redemp-

tion of a mortgage from the date of the mortgage, and this suit was brought in 1877, not many years short of the sixty years.

When the suit came before the Subordinate Judge, he gave a very long judgment, going into all the facts of the case, the result being that he was of opinion that the decree in 1825 must be regarded as a decree, and not as a mortgage, and that under the Act XXIII. of 1861, sect. 11, which provides that questions arising between the parties to the suit and relating to the execution of the decree must be determined by order of the Court executing the decree, and not by a separate suit, the parties ought, if they wished to redeem the property, to have applied to the Court to execute the decree by putting them into possession of the property after paying the money due on the mortgage; and inasmuch as the time limited by law for the execution of the decree had long since elapsed, and had indeed elapsed at the time when the Plaintiff had become the purchaser of the equity of redemption in right of which he brought the suit, there was no cause of action existing and the suit was barred.

The High Court took the same view of the matter, and held that the suit was barred by the Act XXIII. of 1861, and therefore the Plaintiff could not sue to redeem in the manner in which he claimed. Their Lordships are of opinion that this view, which was taken by the lower Courts, is the right one; and that the right of the mortgagors must be treated in this suit as a right to execute the decree, and not a right to sue as for the redemption of a mortgage.

It was contended by the learned counsel for the Appellant that he could fall back upon the right to redeem the mortgage of 1806, the law of limitation, by Act XIV. of 1859, providing that there should be sixty years for a suit to redeem from the time of the mortgage, or from the date of an acknowledgment made in writing signed by the mortgagee, or some person claiming under him. The difficulty in the way of the Appellant availing himself of that is, that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mortgage of 1806, or allege that there had been an acknowledgment of that mortgage. If he had, the question whether there had been such an acknowledgment made would have been inquired

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into in the lower Courts; but he treated the decree as the mortgage which he sought to redeem; and supposing that he could, according to the decision of the High Court of *Madras*, which was cited, fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal. It would be making a different case from that which he made in the lower Courts, and on which the case has been tried and decided.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

Solicitor for Appellant: *T. L. Wilson.*

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Feb. 17, 18; *March* 6.

DHARANI KANT LAHIRI CHOWDHRY . PLAINTIFF;

AND

KRISTO KUMARI CHOWDHRANI AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Benami Purchase—Evidence.

Case in which it was held on the evidence, in a suit brought in 1879, that a purchase by a Hindu wife of a share of her husband's ancestral estate in 1842 was benami for her husband.

APPEAL from a decree of the High Court (*McDonell* and *Field*, JJ., Feb. 6, 1882) reversing a decree of the Subordinate Judge of *Mymensingh* (April 9, 1883) and dismissing the Appellant's suit with costs.

The question was one of fact, raised in a suit brought on the 27th of February, 1879, whether a certain three gundah share of pergunnah *Sherepore* which, on the 9th of June, 1842, had been purchased in the name of *Srimati Chowdrani*, had been purchased by her as her absolute property, or had been really purchased by her husband, *Goluck Nath Chowdhry*, but benami in her name.

* *Present*:—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

The Subordinate Judge decided that her purchase was benami for her husband, the High Court that it was an absolute purchase with her own funds on her own behalf.

Cowie, Q.C., and *Doyne*, for the Appellant.

Cowell, for the Respondents.

The cases cited were *Sreeman Chunder Dey* v. *Gopaul Chunder Chuckerbutty* (1) and *Raja Chandra Nath Roy* v. *Ramjai Mazumdar* (2).

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March 6.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

At a sale on the 6th of September, 1871, in execution of a decree against one *Goluck Nath Chowdhry*, the original Appellant *Tarini Kant Lahiri Chowdhry*, who has died during this appeal, became the purchaser, for Rs.61,100, of whatever right, title, and interest *Goluck Nath* had in twelve gundahs out of a share of one anna fifteen gundahs of the zemindary No. 144, of pergunnah *Sherepore*, in the zillah *Mymensingh*, and received the sale certificate of the Court, dated the 30th of November, 1871. It does not appear that he took any steps upon this purchase to obtain registration of his name, but upon *Srimati Chowdrani*, the widow of *Goluck Nath* (he having died in the meantime), making an application, under the *Bengal* Act VII, of 1876, to the Deputy Collector of *Mymensingh* to have her name registered in respect of the three gundahs share of the one anna, fifteen gundahs, he objected, on the ground that she had no share in the estate, and was not entitled to registration. The title of *Srimati* was said to be founded on a purchase by her, at a sale on the 9th of June, 1842, of the three-gundahs share, part of twelve gundahs of which her husband *Goluck Nath* was then the proprietor, by the Collector of *Mymensingh*, in satisfaction of a claim of the Government against *Goluck Nath* as surety for one *Jugal Kishore Sen*, who was employed in the *Mymensingh* Collectorate. The Appellant contended that this purchase was a benami transaction,

(1) 11 Moore's Ind. Ap. Ca. 43. (2) 6 Beng. L. R. (P.C.) 303.

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and that *Goluck Nath* was the real owner of the three gundahs when the sale to him was made. The Deputy-Collector rightly refrained from deciding that question. He found that *Srimati*, subsequently to her purchase, obtained registration of her name as proprietress jointly with the other proprietors, but did not find the date of it more precisely. He found that the ijardar, who will be referred to afterwards, was in possession for her, and that her name was in the previous register of proprietors, and ordered her to be registered as proprietress of what he described as equivalent to the three-gundahs share. This order was made on the 28th of February, 1878, and in consequence of it the present suit was instituted, on the 27th of February, 1879, by the Appellant against *Srimati* and her son *Hurro Coomar Chowdhry*. The plaint prayed that the Plaintiff's title to the three gundahs might be declared, and his name be directed to be registered in respect thereof. The written statement of *Srimati* stated that she made the purchase *bonâ fide*, and really for herself, with the money of her own fund and own stridhan.

Goluck Nath was the son of *Rama Nath*, one of five brothers, each of whom had a share of six gundahs in the estate. On the death of *Rama Nath*, *Goluck Nath* became entitled to his six gundahs. He afterwards inherited the six gundahs of one of his uncles, and, being thus entitled to twelve gundahs, became surety for *Jugal Kishore Sen*, and pledged one-fourth of his then share in the property. This fourth was the three gundahs sold on the 9th of June, 1842. Subsequently *Goluck Nath* inherited the share of another uncle, and he then sold a twelve-gundah share to one *Shib Dyal Tewari*, and, upon the same date, he and his wife *Srimati* executed, in favour of *Shib Dyal Tewari*, an ijara, or usufructuary mortgage, of a further six gundah share for the period of twenty-six years. The date of this ijara is the 6th of December, 1859. Its not having expired when the suit was brought is the reason that the plaint prayed for a declaration of title only and not for possession. After this sale and mortgage *Goluck Nath* inherited the share of another uncle, and thus, at the time of the execution sale in September, 1871, there were twelve gundahs, of which *Goluck Nath* was clearly entitled to nine, and the remaining three are the subject of the present suit.

The certificate of the sale on the 9th of June, 1842, states that the property was purchased by *Doorga Pershad Roy*, the mokhtar of *Srimati Chowdhrani*, of *Girda*, in pergunnah *Sherepore*, for the sum of Rs.560; and that on payment of the earnest money a proceeding was passed by the *Dacca* Commissioner, on the 15th of July, 1842, sanctioning the sale, and thereupon the said purchaser paid the whole amount of the purchase-money into the public treasury. The evidence for the Plaintiff was that *Doorga Pershad Roy*, who had died before the trial, was the servant of *Goluck Nath*, and served him as naib, and was said by *Hurro Coomar Chowdhry* not to have been his mother's servant before the sale, that the earnest money, about Rs.100 or Rs.125, was paid to *Doorgo Pershad* by *Goluck Nath*, that *Goluck Nath* paid the purchase-money, and borrowed it from *Madari Lal Bajpai*, and gave a bond for it. *Madari Lal*, who was living, and was said to have a house in *Rae Bareli*, was not called. A witness also deposed that *Nobo Coomar Chowdhry*, a cousin of *Goluck Nath*, who was present at the sale and purchased other properties, told *Goluck Nath* to keep this property. There were several sureties whose property was sold at the same time. The evidence of *Srimati* herself, who was examined as a witness, was that *Doorga Pershad Roy* purchased for her, and she paid the purchase-money, that she gave him Rs.1000 out of Rs.3000 which she had from presents on the occasion of her marriage and money her mother-in-law left her. She said that she did not tell her husband anything about the auction sale, she did not tell him she would purchase the property, and he did not tell her anything about the purchase of that property. She was about twenty-three or twenty-four years of age when her mother-in-law died, which was about a year before. She was supported in this account of the transaction by two of her witnesses. The Subordinate Judge, a Hindu, who found that the purchase was a benami one said it was unlikely and incredible that she, a purdah-nashin lady in a Hindu family, and the wife of a respectable zemindar, should herself bring the money and give it to an officer, that there should have been one or two unconnected persons present, and that they witnessed that fact. The High Court, on the contrary, were of opinion that the story told by the Plaintiff's witnesses of the

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manner in which *Goluck Nath* supplied the money with which the purchase was made was "not in itself a very credible one," and they said that the impression which the evidence left upon their minds was that *Srimati* had funds of her own, and that with a portion of these funds this share in the property was purchased. In this conflict of opinions their Lordships are disposed to prefer that of the Subordinate Judge, who saw the witnesses, and would be better acquainted with the habits of Hindu ladies than the Judges of the High Court could be.

There is, however, an important fact which the High Court does not appear to have noticed. It has been seen that the sum paid for the three gundahs was Rs.560. *Srimati* in her deposition said that the income of the property purchased by her at the auction sale would be Rs.700 or Rs.800 a year, exclusive of the sudder rent. The Defendants put in evidence an attested copy of a bond, dated the 21st of February, 1855, by which *Srimati* mortgaged to *Shibdyal Tewari* one gundah out of the three for a loan of Rs.4500, stated to be taken by *Goluck Nath* and herself. This would give to the three gundahs at that time a mortgage value of Rs.13,500. It appears to their Lordships that this mortgage is also some evidence that *Goluck Nath* was the real owner.

On the 30th of March, 1855, *Shibdyal Tewari* obtained a decree upon this bond against *Goluck Nath* and *Srimati* for Rs.4936 for principal, interest, and costs. On the 12th of November, 1859, *Srimati* executed a mokhtarnama, in which it is stated that having received Rs.7795, inclusive of costs and interest due to *Shibdyal Tewari* on this decree, and Rs.26,205 in cash for payment of the debts of other creditors, she appointed her son, *Hurro Coomar Chowdhry*, mokhtar on her behalf for the purpose of granting a temporary ijara, together with her husband, to the said *Tewari*, of her three gundahs, and three out of the six obtained by her husband by right of inheritance from his uncle, *Gopinath Chowdhry*, at an annual rental of Rs.1760 14*a*. This shews a value of the three gundahs slightly in excess of that before given. The ijara was executed accordingly, and is dated the 16th of December, 1859, there being to it a schedule of nankar lands which were excluded from it. There is no evidence what the debts of other

creditors were, whether of *Goluck Nath* or of *Srimati*. Their Lordships think it is improbable that if *Srimati* had become the owner of the three gundahs as her stridhan, and had incurred debts which had to be paid by borrowing money, she would not have made a separate mortgage of her three gundahs. If she were not a benamidar the transaction is a singular one, if she were it is explicable. It seems more probable that the debts were *Goluck Nath's*, and *Srimati* joined in the mortgage because she was the apparent owner. The difference between the price paid for the three gundahs in 1842 and the value is very significant. There is no evidence of what happened at the sale, what biddings there were, or how the property came to be sold for so small a sum. It appears to their Lordships incredible that *Goluck Nath* allowed this, which was a fourth of the ancestral property he then had, to be purchased by his wife on her own account, and to become her stridhan, with the incidents belonging to such property.

As to the evidence of possession, the registry of *Srimati's* name, whenever it took place, is of no value, as it would follow the sale certificate; and rent suits would be properly brought in her name jointly with *Goluck Nath*, as was done in the suit the decree in which is in the record. The witnesses to possession cannot be relied upon. The Subordinate Judge said that the evidence of some of the Defendants' witnesses with regard to this was clearly tutored and false, and the High Court say they think there is as good evidence on one side as on the other.

It was argued for the Respondents that the Appellant claimed to be registered for the first time in February, 1878, and that he might have taken proceedings with regard to the nankar lands before then. It does not appear that he could have been registered separately for those lands. The point was not taken in the Lower Courts, where an explanation of his not doing so might have been given. As to the six gundahs included in the ijara, it is clear, from the judgment of the Deputy Collector before noticed, that a claim to be registered in respect of those would have been unsuccessful. In fact, the Appellant did not, in February, 1878, claim to be registered. He only objected that *Srimati* was not entitled to registration. She admitted in her

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evidence that he was in possession of the other six gundahs, but whether his name had been registered in respect of them did not appear.

Their Lordships have not been unmindful that this is an inquiry into the nature of a transaction which took place so far back as 1842, but until the Appellant's purchase no occasion had arisen for the inquiry. There was not any opposition of interests between *Goluck Nath* and his wife, and the Appellant brought his suit without substantial delay after he found his title challenged. Moreover, though some evidence has been lost which might have been material, there still exists one of the co-sureties, and, what is more important, *Srimati* herself is living, who, if her story be true, was the leading actor in the acquisition of the property by herself.

Their Lordships have to decide between the conflicting decisions of the Lower Courts on a question of fact. They think the reasons given by the High Court for its decision are not satisfactory, and their consideration of the evidence in the case has brought them to the same conclusion as the Subordinate Judge. They will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to decree that the appeal to that Court be dismissed with costs. The Respondents will pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*
Solicitors for Respondents: *Watkins & Lattey.*

JUDOO LALL MULLICK . . . . . DEFENDANT;

AND

GOPAUL CHUNDER MOOKERJEE AND ANOTHER . . . . . } PLAINTIFFS.

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March 17, 18, 30.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Right of Way—Reasonable User of a Passage—Breach of User—Aggravation of Servitude.

Where the user of a passage by the Plaintiffs' scavengers three or four times in the year for upwards of twenty years for the purpose of removing refuse from a privy was relied upon as establishing the Plaintiff's right of way :—

Held, that it was no breach or discontinuance of the user that the Plaintiffs admitted instead of their own the municipal scavengers to whom they were bound by law to afford free access. Nor was a daily user by the latter an aggravation of the servitude, since it appeared to be reasonable and convenient and no agreement had been shewn specifying times or occasions of access.

APPEAL from a decree of the High Court (*Garth*, C.J., and *Cunningham*, J., Jan. 27, 1883) reversing a decree of *Wilson*, J. (March 14, 1882).

The decree appealed from declared that the Respondents were, as owners of the house No. 66, *Pathooria Ghattah Street*, entitled to use the passage in dispute for the purpose of carrying away the night soil from a privy of their house at all proper and convenient times in the year, and a perpetual injunction was awarded against the Appellant, restraining him, his servants and agents, from interfering with such user of the said passage. The Respondents claimed access as of right along the passage in dispute. The Appellant contended that they had not established that right by open and continuous user of his land for the required period.

The *Calcutta* municipality, under sect. 225 of Act IV. of 1876, adopted a system of drainage, and it was not disputed that from the time of their laying down pipes the duty of cleansing the Plaintiffs' privies was discharged by the municipal mehters alone, and that the Plaintiffs or their tenants ceased to use the passage in question.

* *Present* :—LORD BLACKBURN, LORD HOBHOUSE, and SIR RICHARD COUCH.

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The judgment of the Chief Justice, so far as was material, is as follows:—

"The only difficulty which I feel is as to the extent of the Plaintiffs' right. Are they entitled to the use of the drain only three or four times in a year, which according to the evidence of the Durwan was as often as they were in the habit of using it, or ought we to give the evidence of user a more liberal construction, and say that they had a right to the drain for the purpose of cleansing their privies as often as necessity required.

"I confess I have had some doubt about this, and I have found no direct authority upon the subject, but I have come to the conclusion that the latter is the more reasonable view to adopt. The times at which the Plaintiffs' cesspools were cleansed were (according to the evidence) no particular stated periods. The cesspools were emptied, according to native custom, as many times in the year as they became full, and I cannot doubt that if the number of the Plaintiffs' family had increased so that it became necessary to empty them more often, the Plaintiffs would have had a right to use the drain for that purpose.

"It has now become necessary in consequence of the new sanitary rules of the municipality, to cleanse the privies every morning, and if the true construction of the Plaintiffs' right was, as I conceive it to be, to use the drain as often as was necessary for cleansing the privies, it follows that they may now use them every morning. The times at which they should do this should of course be proper and convenient times. The evidence is that the filth was removed in the early morning, and probably this would be the most convenient time now for its removal.

"It has been strongly urged upon us that if we put this construction upon the Plaintiffs' right we shall be imposing upon the Defendant, as the owner of the servient tenement, a much heavier burden than, according to the ancient use of the drain, he ought to bear. But it must be borne in mind that so far as the quantity of sewage is concerned no larger quantity will be carried down the drain now than has always been carried heretofore.

"It will only be carried more frequently and in much smaller quantities, and so far as health is concerned I suppose that the

present system is likely to be more healthy than the former one."

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Doyne (*Phillips* with him), for the Appellant, contended that on the evidence an open and continuous user of the passage in dispute for twenty years was not established. If it should be found that the Respondents and their servants had exercised the right of way which they claimed up to the time of the drainage pipes being laid down by the municipality, the right then ceased, and the discontinuance of user was fatal to this suit. The obstruction complained of was not offered to the Respondents but to the servants of the municipality. Even if a right of way was established and continued, still it was limited by the extent of the user. The only user of which there was evidence was a user three or four times in the year. Such user could not be enlarged, and the servitude, if any, aggravated so as to impose on the owner of the servient tenement the additional burden of having the privy cleaned every day, or so often as the municipality might think fit. Reference was made to *Wimbledon and Putney Commons Conservators* v. *Dixon* (1); Act IV. of 1876 (*Bengal* Council), sects. 235, 238, and sect. 340 of the byelaws.

Rigby, Q.C., and *J. D. Mayne*, for the Respondents, contended that the user was established by the evidence, and that there was neither discontinuance nor any aggravation of the servitude. The extent of the user no doubt regulates the right, but the purpose of the user must be considered. The user here had not been extended to any but the original purpose for which it had been resorted to, and the greater frequency of the user was not shewn to be unreasonable or in excess of what was necessary to effectuate the purpose in view. Reference was made to *Dand* v. *Kingscote* (2), and to *Goddard* on Easements (3rd ed.), p. 316.

Doyne replied.

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March 30.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiffs below, who are the Respondents here, and the

(1) 1 Ch. D. 362. (2) 6 M. & W. 174

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Defendant, who is the Appellant, occupy contiguous houses and premises in *Calcutta*, with a southern frontage in *Pathooria Ghattah Street*. The Plaintiffs' house lies to the eastward of the Defendant's. Adjoining the north side of the Defendant's premises lies a piece of ground, also belonging to him, and fronting northwards to a street called apparently by various names, of which *Jorabagan* is one. At a point between the two streets the Defendant's property juts out a few feet to the eastward, and to that extent overlaps the property of the Plaintiffs, and lies to the north of it.

The following facts are common to the case of both parties; that an open drain used to run along the eastward boundary of the Defendant's property from the point where it juts eastward into *Jorabagan*; that at the same point there communicated with this drain one of the drains of the Plaintiffs' house leading directly from one of their privies; that at the point of communication there was a doorway in the Plaintiffs' wall; and that in the year 1876 the drain was filled up, and has never again been opened.

The Plaintiffs brought evidence to shew further that their house was constructed with a double wall so as to form a narrow passage from the privy to the doorway; that periodically, some three or four times a year, scavengers hired by the Plaintiffs or their predecessors entered the drain at *Jorabagan* and made their way up it to the doorway; that the doorway was furnished with a door which was kept locked, but was opened by the Plaintiffs' durwan on these occasions; that the scavengers came through the doorway, passed along the Plaintiffs' drain between the double walls, and so reached the privy, from which they carried the refuse away through the doorway and down the Defendant's drain into *Jorabagan*. Certainly one of the witnesses, and probably another, deposes to the continuance of this practice from dates more than twenty years prior to the Defendant's interruption of it, which was in December, 1880. The suit was instituted in June, 1881.

Against this evidence the Defendant has produced nothing at all except that he never saw the Plaintiffs' scavengers at work, and that he and Mr. *Edwards*, a surveyor, say that it was impos-

sible for the scavengers to go where several witnesses saw them go. And, in cross-examination, the Defendant admitted that the doorway could only lead to the drain.

Indeed in this part of the case the Defendant appears to have relied mainly upon imperfections in the Plaintiffs' evidence. Mr. Justice *Wilson* who presided in the Original Court, thought that the Plaintiffs had failed to shew user for twenty years. But it is observable that he says there is only one witness, viz., *Tarrabullub Chatterjee*, who professes to carry his memory back to twenty years at all. He does not notice *Dwarka Nath Bonnerjee*, who had known the privy and drain for upwards of twenty-five years, and who speaks of the action of the Plaintiffs' scavengers, apparently, for the note of the evidence is not perfectly clear, for that space of time. Neither does he notice the probability afforded to the Plaintiffs' story by the construction of their walls and of their doorway, both of which date more than twenty years before the interruption.

Mr. Justice *Wilson* dismissed the suit. On appeal the High Court took a different view, and gave the Plaintiffs a decree establishing their right to use the passage in dispute for the purpose of carrying away their night-soil at all proper and convenient times in the year. Their Lordships concur in the view which the Appellate Court has taken of the evidence, and think that the user on which the Plaintiffs rely is sufficient unless it has been interrupted or altered in character by the events which took place in and after the year 1876.

In that year the Legislature of *Bengal* passed an Act for the more efficient municipal government of *Calcutta*. Under the powers conferred by that Act the town commissioners made bye-laws to regulate the removal of refuse. It is not to be discharged in any other way than as the commissioners direct. The servants of the municipality are to cleanse daily the privies of every house on account of which a night-soil fee is levied, and for that purpose every occupier of a house is to give free access to his privy. An occupier of land on which a privy is situated, and to which such free access is denied, is not to allow night-soil or filth of any kind to accumulate for more than twenty-four hours. Under these regulations the open drain bordering the Defendant's land was,

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as before stated, filled up, and the surface has been used by the scavengers of the municipality ever since to gain access to the privy of the Plaintiffs for the purpose of removing the refuse. This they do daily.

Mr. *Doyne* has argued for the Defendant that the change of system thus brought about operates as a breach of the user by the Plaintiffs, and so destroys their title by prescription. But their Lordships cannot see that the change of system works any discontinuance of the prior user. In point of frequency the user is much more active than before. The purpose is still the purpose of cleansing the privy. The mode of access from *Jorabagan* to the privy is not altered, except that the scavengers, instead of walking in the drain, walk on the surface of the earth that fills it. And it cannot make any difference that the Plaintiffs no longer use the passage to admit their own scavengers, but use it to admit those of the municipality, to whom they are bound to afford free access.

It is then argued that the change from the practice of cleansing at long intervals to the practice of cleansing daily is so great that the servitude gained by user is materially aggravated, indeed that it is applied to a new purpose, which the Plaintiffs have no legal right to do.

But it is difficult to see how the servitude is aggravated, even in the sense of causing more annoyance to the Defendant. In order to afford the requisite access only three or four times a year, the passage must be kept open and unobstructed. That being so, it cannot be much more onerous to the Defendant that a small quantity of refuse should be removed daily than that a large quantity should accumulate and be removed at long intervals of time.

The real question, which is not free from difficulty, is whether the user proved prior to 1876 is one which sustains the right affirmed by the decree under appeal. A servitude gained for one purpose cannot lawfully be used for another. What then is the servitude which the Plaintiffs have acquired over the Defendant's land? There is no agreement specifying times or occasions of access. The Defendant has never till now interfered with the access, or claimed to exercise any control over it. The servants

of the Plaintiffs came and went at their own discretion, or at the discretion of their employers. What is the inference to be drawn? It is difficult to suppose that if they thought fit to use the passage twice as often, or four times as often, as they actually did use it, they were not at liberty to do so. There is nothing in the proved facts to indicate a limit to the user of the passage, except the limit that it must be a reasonable user for the purpose of cleansing. It seems to their Lordships that if, without any action on the part of the municipality, the Plaintiffs had chosen to cleanse out their privy every morning, they might have used the passage at a convenient hour for that purpose. If so, they may now use it for giving access to the servants of the municipality at reasonable and convenient times. And in a legal sense they are not aggravating the servitude at all, for this is the servitude to be inferred from the proved facts.

The result is that in their Lordships' opinion the decree appealed from is right, and this appeal should be dismissed. They will humbly advise Her Majesty to that effect. The Appellant must pay the costs.

Solicitors for the Appellant: *Sanderson & Holland.*
Solicitors for the Respondents: *Wrentmore & Swinhoe.*

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March 19, 23, 24, 25, 26; April 9.

JAGADAMBA CHOWDHRANI AND OTHERS DEFENDANTS;

AND

DAKHINA MOHUN AND OTHERS . . . PLAINTIFFS.

FOUR APPEALS CONSOLIDATED.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation—Act IX. of 1871, Sched. II., Art. 129—Suit to set aside Adoption—Reversionary Heirs barred Twelve Years after Adoption.

A suit "to set aside an adoption" denotes any suit which brings the validity of an adoption under question, and therefore includes a suit for possession dependent on that issue as well as a suit to declare its invalidity:—

Held, therefore, that art. 129 of Act IX. of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession.

Where the Defendants had been in fact adopted by Hindu widows purporting to act in pursuance of their husbands' authority, and such adoptions had been followed by continuous possession, and had been recognised in formal instruments, proceedings, and decrees to which the Plaintiffs were parties:—

Held, that suits by reversionary heirs of the husband brought more than twelve years after the adoptions, but less than that period after their title had accrued at the death of the surviving widow, were barred by art. 129 of Act IX. of 1871.

Raj Bahadoor Singh v. *Achumbit Lal* (1) explained.

CONSOLIDATED APPEALS from two decrees of the High Court (March 25, 1882), reversing two decrees of the Subordinate Judge of *Rungpore* (Oct. 5, 1877), and directing that the Respondents *Dakhina Mohun* and *Annoda Mohun* should respectively recover possession from the Appellants of the immovable properties in suit with costs in both Courts.

The first suit was brought by *Turamohun*, the father of *Annoda Mohun*, the second by *Dakhina Mohun*. The object of both suits was the same. The Respondents sought to recover possession of the properties in suit as the reversionary heirs of the last full owner, one *Hurro Mohun Roy Chowdhry*. Their title accrued on

* *Present*:—LORD BLACKBURN, LORD HOBHOUSE, and SIR RICHARD COUCH.

(1) Law Rep. 6 Ind. Ap. 110.

the death of his surviving widow. The Appellants were in possession, which they defended, alleging that the Appellant *Saroda Mohun* and *Doorga Mohun*, deceased, the husband of the Appellant, *Jagadamba Chowdhrani*, were his adopted sons, and therefore his preferential heirs. The main question in issue on the merits was whether these adoptions were, as the Respondents alleged, invalid, made without authority, and illegal.

The death of *Hurro Mohun* was in 1846, the adoption of *Saroda Mohun* was in 1853, of *Durga Mohun* in 1856. Of the widows of *Hurro Mohun*, *Radha Soondari* died in 1868, *Hurripria* in 1864. The suits were brought, that by *Tarramohun* in 1873, that by *Dakhina Mohun* in 1874. The Respondents admitted an adverse possession against them from the discharge of the manager, *Radha Mohun Ghosal*, on the 22nd of January, 1863, who had been appointed and placed in possession of the properties in suit by the Court. The Appellants alleged that adverse possession against the widows commenced shortly after the death of *Hurro Mohun*.

The First Court held, firstly, that both suits were barred by limitation under Act IX. of 1871, 2nd schedule, arts. 129 and 143; and, secondly, on the evidence, that the adoptions impugned by the Plaintiffs were good and valid.

Those articles are as follows:—

"129. To establish or set aside an adoption—twelve years from the date of the adoption, or (at the option of the Plaintiff) the date of the death of the adoptive father."

"143. For possession of immovable property, when the Plaintiff while in possession of the property, has been dispossessed, or has discontinued the possession—twelve years from the date of the dispossession or discontinuance."

The latter article the Subordinate Judge held applicable, not in consideration wholly of the Plaintiffs' own possession and dispossession, but partly of that of the widows of *Hurro Mohun Roy Chowdhry*, by reason of whose dispossession the Plaintiffs, claiming as reversioners on their death, were equally barred, as would have been the widows.

As to the validity of the adoptions in question, the High Court held, that though a power to adopt had been given, and

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adoptions had been made, or purported to have been made under it, of proper persons, the power had not been exercised in the manner directed by it, and that the adoptions were therefore bad.

There were several issues of law and fact. The main question was whether the suits were substantially to set aside adoptions, and therefore barred by art. 129. If that were decided in favour of the Respondents, the further issue arose whether there had been adverse possession by the Appellants sufficient to bar the suits. As regards the evidence, the fact of adoption was admitted, but the nature and extent of the authority were disputed.

Upon the question of limitation the judgment of the High Court was as follows:—

"As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description, brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow, is, that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow."

"That was admitted to be settled law in a case before the Privy Council (1), and the law has since remained unaltered.

"It has, however, been contended before us as in the lower Court, that the widows never had possession on their own account, but that on the death of *Hurro Mohun* and subsequently his estate has been held on titles adverse to those of the widows, and that therefore their titles, as well as those derived by the ordinary right of inheritance from *Hurro Mohun*, are barred.

"We cannot accept this view of the case. At *Hurro Mohun's* death, in accordance with the adhyakhyanama, the names of the managers or trustees appointed by him were duly recorded in the Collector's register with those of the widows. The power of the widows was, no doubt, limited by that deed; but there was nothing in the deed itself which did or could disinherit the widows or confer on anyone a title adverse to them. There was conferred on them the power to adopt, and the 'managers' were

(1) *Rajendro Nath Boldar* v. *Jogendro Nath Banerjee*, 14 Moore's Ind. Ap. Ca. 67, 70.

directed to hold on behalf of sons to be adopted; but that did not the less vest the estate in the widows until they had adopted. If they never exercised the power of adoption (and we may observe that they could not be compelled to adopt: *Mussummat Pearee Dayee* v. *Mussummat Hurbunsee Kooer* (1); *Banun Doss* v. *Mussummat Tarinee* (2)), the managers would be relieved of their duties unless they were acting for the widows. The Subordinate Judge is wrong in stating that the widows were disinherited. That could not be, except in favour of some living being. They could not be disinherited in favour of some one whom they might never call into existence. The fact, too, that the widows were registered with the managers as proprietors of the estates, shews that they were regarded, not only as joint proprietors, but as in joint possession. Next, if we look to the evidence, we find that very shortly afterwards the widows succeeded in getting rid of the managers, and were recorded not only as sole proprietors, but in sole possession on their own account; and this is remarkable, because at that time they had exercised the power to adopt and had begun to dispute with one another regarding their relative rights in this respect. Under such circumstances, we cannot agree with the lower Court that the suits are barred by limitation, inasmuch as they have been brought within twelve years from the death of *Radha Soondari*, the elder widow, who survived *Hurripria*, the younger."

Doyne, and *Mayne*, for the Appellants, contended that the suits were barred by limitation. Otherwise they stated that the evidence supported the validity of *Doorga Mohun's* adoption, and the Appellants by agreement were entitled to moieties of the disputed properties; but were directed to confine themselves in the first instance to the issue as to limitation. Substantially the suits were to set aside certain adoptions, and therefore were barred by art. 129 of sched. II. of Act IX. of 1871. [LORD BLACKBURN:—How do you make them out to be suits to set aside adoptions? They seek to recover possession and may admit adoption, while denying their efficacy to pass title.] To construe Act IX. of 1871 it is necessary to refer to the previous legislation. It is a great

(1) 19 Suth. W. R. 127. (2) 7 Moore's Ind. Ap. Ca. 190.

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hardship on an adopted son to have to prove his adoption more than twelve years after date. Reference was made to *Fakharuddin Mahomed Ahsan Chowdry* v. *Official Trustee of Bengal* (1). See Regulation III. of 1793, sect. 14; Act XIV. of 1859, sect. 1, cl. 12. The following cases were cited: *Bhyrub Chundur Chowdhree* v. *Kales Kishwur Raee* (2); *Govindkishore Roy* v. *Radhamadhib Adheekaree* (3); *Sooburnomonee Dabea* v. *Petumber Dobey and Others* (4); *Radhakissoree Dossee* v. *Guthee Kissen Sircar* (5); *Radhakissen Mahapater* v. *Sreekissen Mahapater* (6); *Juggendronath Banerjee* v. *Rajendronath Holdar* (7); *Srinath Gangopadhya* v. *Maheschandra Roy* (8); *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea* (9); *Raj Bahadoor Singh* v. *Achumbit Lal* (10); *Gopalayyan* v. *Raghupatiayyan* (11); *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (12). As regards adverse possession, the evidence, oral and documentary, was referred to in order to shew that it had begun from within shortly after *Hurro Mohun's* death, and at least had continued for more than twelve years preceding the suits. The widows represented the husband's estate, and the possession was adverse to them whether the adoptions were valid or invalid. If valid, the sons were in possession as of right. If invalid, the possession may have been obtained improperly, but it is hostile to the widows, and being under colour of right is adverse to them as representing their husband's estate. Articles 142 and 145 were referred to, and also *Nobinchunder Chuckerbutty* v. *Issurchunder Chuckerbutty* (13); *Aumirtolall Bose* v. *Rajoneekant Mitter* (14); *Srinath Kur* v. *Prosunno Kumar Ghose* (15); *Saroda Soondury Dossee* v. *Doyamoye Dosseeo* (16): *Doe* d. *Sib Chunder Doss* v. *Sibkissen Bonnerjee* (17). The suits being barred by force of adverse possession under Act XIV. of 1859, sect. 1, cl. 12, a title being thence derived good against everybody, the

(1) Law Rep. 8 Ind. Ap. 197.
(2) S. D. A. (1850) p. 369.
(3) S. D. A. (1856) p. 450.
(4) Marshall, 221.
(5) Suth. W. R. (1864) 272.
(6) 1 Suth. W. R. 62.
(7) 7 Suth. W. R. 357.
(8) 4 Beng. L. R. F. B. 3.
(9) 15 Beng. L. R. 1, and p. 9, n.
(10) Law Rep. 6 Ind. Ap. 110.
(11) 7 Madras H. C. R. 250.
(12) 11 Bombay H. C. R. 190.
(13) 9 Suth. W. R. 505.
(14) Law Rep. 2 Ind. Ap. 113.
(15) Ind. L. R. 9 Calc. 934.
(16) Ind. L. R. 5 Calc. 938.
(17) 1 Boulnois' Rep. p. 70.

Appellants cannot be deprived of their estate by an Act subsequently passed. The Act IX. of 1871 was a remedial Act, and did not purport to interfere with title previously acquired. See *Maharani Rajroop Koer* v. *Syed Abul Hossein and Others* (1).

Cowie, Q.C., and *Cowell*, for the Respondents, contended that the suits were barred under art. 142 of the Act referred to, having been brought within twelve years of the death of the surviving widow; or under art. 145. The suits were not barred by art. 129 for they were not suits either in form or in substance to set aside adoptions. Till the death of the surviving widow the Respondents had no title. Their cause of action as regards recovery of possession did not accrue till then. Prior to the death the only suit which they could bring was one which it was discretionary with the Court to entertain, and their title being then a contingent one they might never reap any fruit from their litigation. Declaratory suits were barred in twelve years under this section, and so also were all suits in which the Plaintiff sought to set aside the adoption. Here the Plaintiffs were indifferent whether the adoption stood or not; their contention was that whatever other rights those adoptions conferred, being made without authority they did not operate to make the Appellants preferential heirs to *Hurro Mohun*.

In substance the Respondents claimed to succeed as preferential heirs, without disturbing the adoptions which had been made in fact, and which might be taken to have constituted the relationship of sons to the widows, conferred rights of maintenance, and severed the children from their natural families. In form there were two tests to be applied to ascertain whether these were suits to set aside adoptions; first, what was the nature of the decree made, which in this case was simply a decree for possession of the properties claimed without reference to the subject of adoption; second, where lay the *onus probandi*, who was entitled to succeed if no evidence was given. Art. 129, on its true construction, must be taken to relate to those suits where the Plaintiff impeached an adoption and sought to set it aside, not to those where granted the adoption in fact, he asserted a

(1) Law Rep. 7 Ind. Ap. 240.

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preferential title. There could be no hardship on an adopted son in being obliged to preserve the evidence of an authority to adopt, which in this case was in writing and registered, and which when referred to did not authorize the adoption. Reference was made to *Srinath Gangopadhya* v. *Maheschandra Roy* (1); *Gopalchunder Mitter* v. *Moheshchunder Boral* (2); *Jogendronath Banerjee* v. *Rajendronath Holdar* (3). It was further contended that the doctrine of their Lordships in *Raj Bahadoor Singh* v. *Achumbit Lal* (4) was clearly in point, and binding. Upon the evidence no adverse possession was shewn within twelve years of suit, especially having regard to a manager having been appointed by the Court, who was not discharged till within the statutory period. His possession was not on behalf of the alleged adopted sons, but on behalf of the person or persons legally entitled, and on the authority of *Rao Karan Singh* v. *Raja Bakar Ali Khan* (5) could not be said to be adverse to the true owner.

Doyne replied.

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April 9.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Their Lordships have upon consideration found themselves able to dispose of these appeals upon one of the questions which were argued at the bar very fully, and with great learning and ability, with reference to the law of limitation. And though the cases, which embrace many complicated issues, are very voluminous, the facts material for this decision are few and simple.

Hurro Mohun died childless in April, 1846, leaving two widows. That he had given them permission to adopt sons is clear; but in what order of priority the permission was given is one of the many points in dispute. What happened was that each of the widows adopted a son who died, and afterwards each of them adopted another. Of course both adoptions could not be valid, though both might be invalid, as the Plaintiffs contend they were. But during the minority of the adopted sons both were

(1) 4 Beng. L. R. F. B. 3.
(2) Ind. L. R. 9 Calc. 230.
(3) 7 Suth. W. R. 357, and in appeal, 14 Moore's Ind. Ap. Ca. 67.
(4) Law Rep. 6 Ind. Ap. 110.
(5) Law Rep. 9 Ind. Ap. 99.

treated as adopted, and after they attained age they agreed to raise no question as between themselves, but to enjoy *Hurro Mohun's* property in equal shares. If therefore either of the adoptions was valid, both of the adopted sons were safe in their possession.

The Plaintiffs in the suits are the persons who, failing adoption, were the heirs of *Hurro Mohun* at the death of his surviving widow. One suit was instituted by one heir in April, 1873, the other by the other heir in August, 1874. The Defendant *Saroda* was adopted in December, 1853, the Defendant *Jagadamba* is the widow of *Durga*, who was adopted in August, 1856. The surviving widow, *Radha Sundari* by name, died in July, 1868. It thus appears that the earliest suit was brought eighteen years after the latest adoption, and the latest suit a little less than six years after the death of the surviving widow.

The *Limitation Act* in force when these suits were commenced is Act IX. of 1871, and it is on the construction of that Act that the question depends. The suits may possibly be considered as falling under one of three articles. They may be considered as suits to set aside an adoption (art. 129), or as suits for possession of immoveable property by Hindus entitled to possession on the death of a Hindu widow (art. 142), or as suits for possession of immoveable property not otherwise specially provided for in the Act (art. 145).

The Subordinate Judge of *Rungpore*, who heard the suits in the first instance, dismissed them with costs. He decided for the Defendants, not only on the ground that one of the adoptions was valid, but also on the ground of limitation. His opinion is found in the record thus expressed, probably with some inaccuracy in the transcription :—

"The Plaintiffs, although they have only sued for possession of the property as heirs-at-law of their deceased uncle *Hurro Mohun Chowdhry*, but as a fact apparent in itself they cannot likely succeed unless and until the adoptions of *Saroda Mohun* and *Doorga Mohun* be set aside, making the way plain and smooth for the Plaintiffs to enter into possession as heirs of *Hurro Mohun Chowdhry*. The formation of the plaints can render no advantage to the Plaintiffs. Whatever terms they might have used in

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framing the plaints and the consequential relief sought for, they are in effect suits to set aside the adoptions, and should have therefore been brought within the time allowed by law, to be reckoned from the dates of the successive adoptions."

That is a clear statement of reasons for thinking that the suits fall under art. 129, and are therefore each barred by the lapse of twelve years from the date of the adoption which it seeks to set aside.

The High Court reversed the decision of the Subordinate Judge, and gave the Plaintiffs the decree they asked for. On the issue of limitation they say:—

"As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow is that limitation is calculated from the time when title of the reversionary heir accrues on the death of the Hindu widow."

They do not appear to have addressed themselves to the question whether or no art. 129 governs the case.

The Plaintiffs' counsel here contended that the case falls under art. 142, or if not, that it is not specifically provided for and so falls within art. 145, and that in either case time runs against them only from the death of *Radha Sundari*. The endeavour to apply those articles raises several difficult questions of fact and law, but it is not necessary to pronounce any opinion on them if art. 129 applies to the suits, and raises a bar which in each suit is twelve years after the adoption.

It is ingeniously argued for the Plaintiffs that they are suing, not to set aside any adoption, but to recover possession on their *primâ facie* title as heirs, that it is the Defendants who have to allege and prove adoption, and that, on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the Defendants are in possession in the character of adopted sons; the *primâ facie* title is with them, and until that is displaced they ought to retain their possession. It may not make any difference in law, but it does so happen in this case

that the Plaintiffs have recognised the adoptees as such for many years in formal instruments and proceedings, and even that parts of the property now sued for have been recovered from the Plaintiffs in suits instituted on behalf of the adopted sons by the manager of their estate during their minority. Indeed in one of the present suits the Plaintiff tells the story of the adoptions, and directly impeaches their validity. In the other the plaint is silent on that point. But whatever the mode of pleading, there is but one issue on the merits of the case, namely, the validity or invalidity of the adoptions, by virtue of which alone the Defendants hold their property. If the validity is proved, the Plaintiffs cannot succeed in their claim. Now art. 129 of the *Limitation Act* provides that for a suit to establish or set aside an adoption the period of limitation shall be either the date of the adoption or the date of the death of the adoptive father. And each of the Defendants contends that the true construction of these words is that the validity of his adoption shall not be challenged after twelve years from the later of the two dates assigned as the starting points of time, which in this case is the date of the adoption.

It must be confessed that the words of the article are not such as to prevent doubt or difficulty in its construction. The expression "suit to set aside an adoption" is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all. Very early in the argument their Lordships asked to be informed what is meant by setting aside an adoption. The only answer is in the language of the reports, from which it would seem that the phrase "suit to set aside an adoption" is a short and familiar way of describing a class of suits well known to practitioners and spoken of in those terms with accuracy enough for all ordinary purposes. In the earliest case cited at the bar from the S. D. A. Reports for 1850 it was held that the Plaintiffs had a cause of action when possession was taken under colour of an adoption. Mr. Justice *Colvin* says, "The plain remedy for the Plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of

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that neglect, and to bring the adoption to an issue under colour of a statement" of continued possession of the adopting widow. In the case cited from the S. D. A. Reports for 1856 the suit was for possession of the property; but the reporter styles it "suit to set aside adoption." In the case cited from the 4th *Bengal* Law Reports the reporter calls the suit one to recover possession and to set aside the adoption. Mr. Justice *Kemp* calls it a suit to set aside an adoption. Chief Justice *Peacock* corrects the expression, saying, "Although the suit is said to be a suit to recover possession by setting aside the illegal adoption, the suit is, in fact, a suit by the reversionary heir to recover possession notwithstanding that adoption." In the case cited from 15th *Bengal* Law Reports, where the adopting widow was still living, the suit is called one to set aside an adoption. In his judgment Mr. Justice *Jackson* refers to the case in the 4th *Bengal* Law Reports as one in which a Full Bench determined "that the cause of action in a suit for setting aside the adoption accrues after the death of the widow."

It thus appears that the expression "set aside an adoption" is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the *Limitation Act* of 1877, which superseded the Act now under discussion, the language is changed. Art. 128 of the Act of 1877, which corresponds to art. 129 of the Act of 1871 so far as regards setting aside adoptions, speaks of a suit "to obtain a declaration that an alleged adoption is invalid or never in fact took place," and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression "suit to set aside an adoption" to be one of a loose kind, and that more precision was desirable.

If then the expression is not such as to denote solely, or even

to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The Plaintiffs' counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the Plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the Defendant is in possession.

Considerable stress has been laid upon a passage in the judgment which this Board delivered in the case of *Raj Bahadoor Singh* v. *Achumbit Lal* (1), and which is said to be decisive of the present point. The passage is as follows:—

"Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit."

Detached from its context and from the facts of the case, that would seem to be a strong authority in favour of the Plaintiffs in the present case. But when read with what goes before, it has no such effect. The suit in question was brought by the heir of *Doorga Pershad* to recover possession of his estate after his widow's death. The real contest was whether he had given an

(1) Law Rep. 6 Ind. App. 110.

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absolute interest to his widow which she could transmit to the Defendant. But she had executed an instrument called a deed of adoption, which their Lordships describe thus:—"This document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. . . . On the above view of the document the words of the statute would seem scarcely applicable to it." And then follows the passage above quoted. It is clear therefore that in that case the Plaintiff was not embarrassed by the widow's adoption of the Defendant. He could recover the estate of *Doorga Pershad* without in any way disturbing the adoption. And to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear.

The result is that for the foregoing reasons their Lordships agree with the opinion expressed by the Subordinate Judge on this point. They think that the High Court should have dismissed with costs the appeal from that Judge's decree, and they will now humbly advise Her Majesty to make a decree to that effect.

The Respondents, who are in the interest of the original Plaintiffs, must pay the costs of these appeals.

Solicitors for the Appellants: *Barrow & Rogers.*

Solicitors for the Respondents: *Watkins & Lattey.*

SRI RAJA RAO VENKATA MAHAPATI SURYA RAO BAHADUR . . . . . } PLAINTIFF;

AND

THE HON. SRI RAJA RAO VENKATA MAHAPATI GANGADHARA RAMA RAO BAHADUR AND ANOTHER . . . . . } DEFENDANTS.

J. C.*
1886
June 4.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Mitakshara Law—Agreement of Joint Owners not to alienate—Rights of Son.

Where two Hindu Mitakshara brothers entered into an agreement that "in case of failure of 'aurasa' (self-begotten) male issue" of one, their joint immovable property should go to the other, and should not be alienated by making adoption and the like; and it appeared that one of them had a son living at the date of the agreement:—

Held, that, whether or not this agreement bound the brothers, it could not bind the son or prevent that son's adoption from conferring title by inheritance.

APPEAL from a decree of the High Court (Sept. 19, 1882), affirming a decree of the District Court of *Godavari* (Aug. 23, 1880) which dismissed the suit. The suit was brought by the Appellant to be declared the next heir of the first Respondent to the zemindary of *Pittaparam* in the district of *Godavari*, and that the adoption by the first Respondent of the second Respondent was illegal and invalid, and without any effect against the right of the Appellant to succeed to the zemindary.

The Appellant based his claim upon a custom which, he alleged, was in force in the zemindary, that only aurasa sons—*i.e.* sons begotten in the male line—should succeed to the zemindary, which was admitted to be ancient and impartible, and that no adopted son could succeed to the zemindary, the practice of adoption being unknown to and against the custom of the zemindary.

The case of the Appellant further was that by an agreement, made between the Appellant's father and the father of the first Respondent, dated the 26th of April, 1845, there was an express

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stipulation that the zemindary could only be inherited by the aurasa sons of the respective parties to the agreement, and that this stipulation bound the first Respondent, who, in contravention of its provisions and the custom of the zemindary, adopted the second Respondent.

Both Courts decided, first, that the Appellant had not by the evidence he had brought forward established satisfactorily a binding custom under which the zemindar (first Respondent) was prevented from exercising a right which the general law gave him; and secondly, as to the agreement, that it did not bind the first Respondent.

Mayne, and *Johnstone*, for the Appellant, contended that the karanamah or agreement of 1845 was binding on the first Respondent as forbidding an adoption, and that it was on the evidence shewn to have been amply ratified by him. See *Trowell* v. *Shenton* (1) as to what constitutes ratification. On the other hand, if in its legal effect it failed to make an adoption invalid, it operated as a family settlement, governing the devolution of property in the absence of natural-born male heirs of the contracting parties. In either way the title of the Appellant was paramount to any claim by the second Respondent under the adoption. Reference was made to the *Nuzvid Case* (2) and the *Tagore Case* (3).

Leith, Q.C., and *Doyne*, for the second Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This case has been very ably argued by the learned counsel for the Appellant. He very properly did not contend that the custom not to adopt had been proved. That is a question of fact which was decided concurrently by both Courts below, and could not properly be raised now before this Committee.

The case having now been thoroughly sifted, it appears that the only point to be decided is, what was the legal effect of the

(1) 8 Ch. D. 318. (2) Law Rep. 7 Ind. Ap. 38; Ind. L. R. 2 Mad. 128.
(3) Law Rep. Ind. App. Supp. Vol. p. 47.

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agreement of the 26th of April, 1845, between *Surya Rao* and his brother *Kumara*. At that time *Gangadhara*, the son of *Surya*, was living. The estate was governed by the Mitakshara law. It is clear that *Surya*, the father, could not by the agreement of 1845 so bind the estate that an adopted son of his son *Gangadhara* should not take by descent. The agreement is contained in the 10th article, by which the two brothers stipulated as follows:—"As to the immoveable property belonging to us both, the said immoveable property shall, in case of the failure of aurasa (self-begotten) male issue in either of these two lines, *i.e.* either for yourself or in your line of aurasa sons or in my line of aurasa sons, be put in possession of the other line, but it shall not be alienated by making adoption and the like." It is unnecessary for their Lordships to determine whether that agreement was or was not binding between the parties who made it. It is clear that the father of *Gangadhara* could not bind his son, who was then in existence, not to adopt, or legally stipulate that if he should adopt, the son so adopted should not inherit. The words are:—"in case of the failure of self-begotten male issue." Mr. *Mayne* was forced to admit that those words meant an indefinite failure of issue; and that an adopted son should not ever take by descent from his father. It appears to their Lordships that that would be entirely altering the law of descent, and contrary to the principle laid down in the *Tagore Case* (1).

Their Lordships are therefore of opinion that the decision of the High Court was right, and that the agreement of 1845 did not operate to prevent the adopted son of *Gangadhara* from succeeding to this property. It has been very properly admitted by the learned counsel for the Appellant that the similar agreement which was made by *Gangadhara* is not one of which the present Plaintiff, who was no party to it, could take advantage.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court, and dismiss this appeal. The Appellant must pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Second Respondent: *Frank Richardson & Sadler.*

(1) Law Rep Ind. Ap. Supp. Vol. p. 47.

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June 8, 9, 25

GENDA PURI AND ANOTHER . . . . . PLAINTIFFS;

AND

CHHATAR PURI . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WEST PROVINCES, BENGAL.

Succession of Mohunts—Custom.

With regard to the succession of mohunts, the only law to be observed is to be found in custom and practice, which must be proved.

Where the Plaintiff failed to prove that the deceased mohunt had the power to appoint his successor, and that the sect to which he belonged were bound to instal the disciple whom he had selected:—*Held*, that his suit must be dismissed.

APPEAL from a decree of the High Court (April 1, 1882) reversing a decree of the Subordinate Judge of *Mainpuri* (Aug. 25, 1879) and dismissing the Appellant's suit with costs.

The subject-matter of the suit was the right of succession to the estate, moveable and immoveable, of one *Kapur Puri*, deceased, who had been a Goshain and mohunt or head of a Hindu religious establishment, situate in mauza *Godha* in the district of *Mainpuri*, who died on the 21st of December, 1873. These properties the Plaintiff, *Genda Puri*, claimed to be entitled to as the chela or disciple of *Kapur Puri*, who had been designated by him shortly before his death as his successor, and he alleged that the Defendant, *Chhatar Puri*, was not a disciple of *Kapur Puri*, and that he had obtained possession after *Kapur Puri's* death by violence and wrong.

The Defendant, by his written statement, denied that the Plaintiff was a disciple of *Kapur Puri*, and asserted that he himself was so, and that he had performed the funeral obsequies and been installed on the gaddi.

The material issues were as follows:—

5. "Is the Plaintiff a disciple of *Kapur Puri Goshain*, and had

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the latter, while in a sound state of mind, made a will respecting the former's succession to the gaddi; and did the Goshains instal the Plaintiff to the gaddi after *Kapur Puri's* demise or not?

6. "Is the Defendant, *Chhatar*, a disciple of *Kapur Puri*, and what are the usages and customs obtaining among the Goshains regarding the installation to the gaddi? What qualifications are necessary in a disciple for his succession to the gaddi, and is the Defendant, *Chhatar*, a profligate, licentious, and a bad character?"

The Subordinate Judge on the fifth issue held that the more credible oral evidence established that the Plaintiff was a disciple of *Kapur Puri*, who shortly before his death had made a will, and had orally designated him as his successor.

And on the sixth issue the Subordinate Judge was of opinion that the Defendant *Chhatar Puri* had been at one time a disciple of *Kapur Puri*, but that the latter had repudiated and expelled him in his lifetime on account of his profligacy and bad character, that the relation of guru and disciple had then ceased and that the Defendant could not succeed contrary to the will of *Kapur Puri*.

The Subordinate Judge also threw out a doubt as to whether the Defendant, having been purchased, as he himself admitted, by *Kapur Puri*, had a legal right to be regarded as a disciple.

The learned Judges of the High Court, without going into the question of the Defendant's title, held that the Plaintiff had failed to establish his, inasmuch as in the opinion of the Court the general effect of the evidence was "to shew that a disciple only can succeed, and that the guru can nominate his successor who as a rule is appointed, but that they (the learned Judges) did not understand the evidence in the sense that the guru had an absolute power of appointment, that the evidence pointed to the necessity of confirmation and instalment on the gaddi to make a complete title," and that "it was plain from the evidence of Plaintiff's witnesses that no such confirmation or instalment had ever been made."

And the learned Judges further expressed a doubt as to whether the Plaintiff had proved that he himself was a disciple of *Kapur Puri*.

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Graham, Q.C., and *Doyne*, for the Appellants, contended that the evidence on both sides concurred in shewing that the right to succeed depended wholly on the act of the mohunt. It lay on him to make a disciple or disciples. In case of there being more than one it lay on the mohunt to designate his successor. Thereupon the disciple so designated became entitled to succeed. The subsequent installation by the brotherhood was a ceremony merely, and was not essential to title. The evidence established that the Appellant had been made a disciple, and that his title to succeed was made out, his designation by *Kapur Puri* as his successor not being necessary under the circumstances. Reference was made to *Dhunsing Gir* v. *Mya Gir* (1); *Ramrutun Das* v. *Bunmalee Das* (2); *Gunes Gir* v. *Amrao Gir* (3); *Surubanund Purbut* v. *Deo Sing Purbut* (4); *Gunga Das* v. *Tiluk Das* (5); *Narain Das* v. *Bindrabun Das* (6); *Mohunt Rama Nooj Doss* v. *Mohunt Debraj Doss* (7). [SIR RICHARD COUCH referred to *Srimati Janoki Debi* v. *Sri Gopal Acharjia and Others* (8)]. *Shamachurn's* Vyavastha Darpana, sect. 160.

C. W. Arathoon (*Umar Baksh* with him), for the Respondent, claimed that he was in possession, that the Plaintiff was bound strictly to prove his title to eject, and that he had failed to do. He referred to *Greedharee Doss* v. *Nundokissore Doss, Mohunt* (9).

Graham, Q.C., replied.

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June 25.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in this case was brought by the first of the Appellants for a declaration of right in respect of the moveable property and for possession of the immoveable property of one *Kapur Puri*, Goshain, the mohunt of a religious establishment in mauza *Godha*, in the district of *Mainpuri*, who died on the 21st of December, 1873, which *Genda Puri* claimed as his disciple

(1) 1 Sel. Rep. 153.
(2) 1 Sel. Rep. 170.
(3) 1 Sel. Rep. 218.
(4) 1 Sel. Rep. 296.
(5) 1 Sel. Rep. 309.
(6) 2 Sel. Rep. 151.
(7) 6 Sel. Rep. 262.
(8) Law Rep. 10 Ind. App. 32.
(9) 11 Moore, Ind. App. Ca. 30.

appointed to succeed him. At the time of his death *Kapur Puri* had two disciples, *Genda* and his brother *Ramjit*. Their Lordships think this was proved, and that the reasons given by the Judges of the High Court in their judgment for not being satisfied with the evidence of it, contrary to the finding of the Subordinate Judge, are not of any weight. The Respondent, *Chhatar Puri*, had also become a disciple of *Kapur Puri* before the year 1868, but it was alleged by *Genda Puri* that he had some time before January, 1872, been expelled by *Kapur Puri* for misconduct, and had ceased to be a disciple. A wajib-ul-arz, dated the 4th of February, 1872, of mauza *Ghaaspur*, part of the property in dispute, which was proved to have been verified by *Kapur Puri*, was relied upon by the Plaintiffs. It contained a statement that he was the present lambardar of the village, and that any person whom he might make a chela (disciple) would succeed him as lambardar after his death. As yet he had made no chela. In case he made no chela his ablest and nearest relation would be lambardar after his death.

The statement that he had made no chela is not only inconsistent with *Chhatar Puri* being then a disciple, but also with the evidence as to the time when *Genda* and *Ramjit* became disciples, which would seem according to some of it to have been before the date of the wajib-ul-arz. It was proved by *Mathura Puri*, a Goshain, that *Kapur Puri* about twenty days before his death, being then ill, called a meeting of the Goshains and householders of the neighbourhood, and in their presence said, "I am sick, there is no hope of my recovery; after my death instal *Genda Puri* on the gaddi, and appoint *Ramjit Puri* as house-steward (bhandari), both of them are my disciples." According to *Tikam Puri*, another witness, his words were, "You are all my brethren. I have no hope of my life. If anything happens to me place *Genda Puri* on the gaddi, and make *Ramjit Puri* bhandari." Another witness, *Shib Lal Puri*, said the words were, "I have made two disciples, viz., *Genda Puri* and *Ramjit Puri* I am ill. There is no certainty of life. Should I die, and a dispute arise (between the disciples), you all should give the gaddi to *Genda Puri*, and make *Ramjit* bhandari." Several other witnesses gave similar evidence.

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Immediately upon his death disputes arose as to the succession, and, by an order of the magistrate of *Mainpuri*, dated the 2nd of March, 1874, in which it is stated that a considerable body of men, taking advantage of the absence of the heir in possession, *Chhatar Puri*, forcibly entered the house, turned out the servants, and kept possession against all comers until a strong body of police had been sent to dislodge them, eleven men were directed to enter into recognizances to keep the peace until the succession was lawfully decided. And, by another order of the magistrate, dated the 10th of March, it was ordered that both the parties should apply to the Civil Court for a certificate of heirship. On the 28th of March, 1874, the tehsildar of *Shikahabad*, having made an investigation and taken the statements of residents and zemindars in the neighbourhood, made a report that *Chhatar Puri* was in possession and *Genda Puri* was not, whereupon the Deputy Collector of *Mainpuri*, by an order without any date, ordered that *Chhatar Puri's* name should be substituted in lieu of that of *Kapur Puri* in the revenue records.

There was no installation of either *Genda Puri* or *Chhatar Puri*. The latter being in possession, *Genda Puri* brought a suit against him *in formâ pauperis*, claiming as heir to *Kapur Puri* according to the Hindu law and the custom prevailing in the Goshain sect. The claim to sue *in formâ pauperis* was disallowed, and he and *Ramjit* then brought a suit for a declaration of right, with a Court fee of Rs.10, which was dismissed, on the ground that it ought to have been for possession, a suit which required a much higher Court fee. The present suit was then brought, the Appellant *Hazari Lal* having been made a co-Plaintiff after its institution in respect of an interest which he had acquired.

The Subordinate Judge of *Mainpuri* dismissed the suit for the declaration of right to the moveable property, on the ground that the persons in possession of it should be sued, and made a decree in the Plaintiff's favour as to the immoveable. This was reversed by the High Court of the *North-Western Provinces*, and the suit was dismissed with costs. That Court was of opinion that the claim rested on the ground that *Genda Puri* was a disciple of the deceased, and appointed by his will to succeed him, and was duly installed, and that the appeal must prevail with reference to the

first and fifth grounds of appeal. The first ground was that the Plaintiff's title, as alleged in the plaint, was not established by reliable evidence, and the fifth that the Plaintiff, having failed to prove his own title to succeed, the title of the Defendant required no scrutiny. The plaint stated that, after the death of *Kapur Puri*, the Goshains installed the Plaintiff to the gaddi. If the evidence had proved that the title to succeed depended solely upon the nomination or appointment by *Kapur Puri*, and the installation was only the giving effect to it, their Lordships would not have considered the failure to prove that averment in the plaint as fatal to the Plaintiff's case. The plaint is very informal, and might possibly be read as stating a title by the appointment of *Kapur Puri*.

In determining who is entitled to succeed as mohunt in such a case as the present, the only law to be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must shew that he is entitled according to the custom to recover the office and the land and property belonging to it. This has been laid down by this Committee in several cases. The infirmity of the title of the Defendant, who is in possession, will not help the Plaintiff as the Subordinate Judge seems to have thought. The witnesses for both the Plaintiff and the Defendant deposed as to the custom. Some said that the choice or election was made by the Goshains, others (and these are a majority) that they instal on the gaddi the disciple whom the guru (mohunt) recommends. One said that the guru nominates his successor, and they give the gaddi to him, and another that when a mohunt becomes ill he leaves directions as to who would become the mohunt. There is no finding of the Subordinate Judge as to the custom. In the judgment of the High Court the whole of the evidence upon it appears to be quoted, and they say, "The general result of this evidence seems to shew that a disciple only can succeed, and that the guru can nominate his successor, who, as a rule, is appointed, but we do not understand the evidence in the sense that the guru has an absolute power of appointment; the evidence points to the necessity of confirmation and instalment on the gaddi to make a complete title; otherwise the ceremony of installation, on which much stress is

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laid, would be but an idle form." It is unnecessary to quote the evidence here. It appears to their Lordships to fail in proving that the mohunt had power to appoint his successor, and the Goshains were bound to instal the disciple that he appointed. What was done by *Kapur Puri*, which in the plaint and judgment of the Subordinate Judge is called his will, was not according to the custom proved sufficient to entitle *Genda Puri* to recover the property. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and dismiss the appeal. The costs of it will be paid by the Appellants.

Solicitors for Appellants: *Ford, Rankin Ford, & Ford.*
Solicitor for Respondent: *T. L. Wilson.*

J. C.*
1886
July 9.

REWA MAHTON . . . . . DEFENDANT;

AND

RAM KISHEN SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Civil Procedure Code, 1877, *s.* 246—*Duty of Purchaser—Validity of Order for Sale may be presumed.*

Held, that, according to the true construction of sect. 246 of Act X. of 1877, a purchaser under a sale in execution is not bound to inquire whether the judgment debtor had a cross judgment of a higher amount such as would have rendered the order for execution incorrect. If the Court has jurisdiction, such purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which execution issues.

APPEAL from an order of the High Court (April 21, 1882), reversing an order of the Subordinate Judge of *Bhagalpore* (Aug. 3, 1880).

The High Court set aside a sale made in execution of one

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Khoob Lal's decree against the Respondent, at which the Appellant had become the auction purchaser of the property seized.

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellant, contended that the High Court had misapplied the provisions of sect. 246 of Act X. of 1877. The decree was validly executed. An order for sale was made by a competent Court, and the Appellant was a *bonâ fide* purchaser for value, entitled to assume that the order for sale was valid, having no notice of anything to the contrary.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a decree of the High Court at *Calcutta* in a suit in which the Respondent, *Mussumat Radheh Koeri*, was the Plaintiff, and *Khoob Lal* and the Appellant, *Rewah Mahton*, and others, were the Defendants. *Koeri* died pending this appeal, and *Ram Kishen Singh*, her son and heir, was substituted for her. It appears that on the 7th of September, 1877, the Moonsif of *Jamoi*, in the district of *Bhagulpore*, made two decrees, one in favour of the Respondent against *Khoob Lal* for Rs.788 0*a*. 9*p*., and the other in favour of *Khoob Lal* against her for Rs.661. On the 10th of November, 1877, the Respondent took out execution against *Khoob Lal* for the whole amount of her decree without giving him any credit for the Rs.661 which he had recovered against her. Under that execution *Khoob Lal* was arrested and detained in prison for a period of about two months, at the expiration of which time he was released on the failure of the Respondent to lodge the necessary diet money. Subsequently, on the 26th of March, 1878, the Respondent made another application for execution against *Khoob Lal* upon her decree, and in that application she gave him no credit for the Rs.661 which he had recovered against her. Upon that execution being granted, an application was made to the Moonsiff by *Khoob Lal* to set it aside. The Moonsiff granted that application, but his decision was, on the 26th of July, 1878, reversed by the District Judge, who held

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that the Respondent was entitled to execute her decree for Rs.788, notwithstanding all that had previously taken place Upon that *Khoob Lal* appealed to the High Court, and whilst the matter was pending before that Court, viz., on the 31st of August, 1878, he applied for execution against the Respondent for the total amount of his decree for Rs.661. The execution was issued, and under it the property of the Respondent, consisting of a 2-annas share of mouzah *Mokoondpore Mahamda*, was attached and sold to the Appellant for a sum of Rs.9775. Application was made to set aside that sale under sects. 311 and 312 of Act X. of 1877 The Moonsiff disallowed the application and confirmed the sale, and his order was on appeal affirmed by the Judge. By the last paragraph of sect. 312 it is enacted that "No suit to set aside on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made."

The present Respondent, however, brought a regular suit against *Khoob Lal*, and the present Appellant, the purchaser under the execution, and others, alleging that, owing to her having a decree against *Khoob Lal* for an amount greater than that of his decree against her, the latter decree was not fit to be executed; that the sale under it was contrary to the powers of the Court, and was not binding upon her, and that the purchaser acquired no right under the sale; and further, that the purchase by the present Appellant took place in collusion with *Khoob Lal*; that *Khoob Lal* was really the purchaser; that he, by fraud, had kept her from knowing that the execution had issued; and consequently that the sale in execution ought to be set aside. She prayed:—"(1.) That the Court will be pleased to hold that the processes of execution of decree of *Khoob Lal*, the Defendant No. 1, were carried out entirely in contravention of law; and that in reality according to law and justice, the Defendant aforesaid had nothing to obtain from your petitioner the Plaintiff; and that the sale which has been held is invalid. (2.) That the Court will be pleased to hold that the processes of the sale aforesaid, and the sale in question, were executed and held fraudulently. (3.) That the Court will be pleased to cancel this sale." Written statements were put in on the part of the several Defen-

dants, and issues were settled. The Subordinate Judge in the first instance settled two issues in bar. The first was:—"Is this case in the regular department,"—that is, is this suit which is brought as a regular suit—"unfit for hearing under the last portion of sect. 312 of the Code of Civil Procedure, or not?" 2nd. "Was it necessary for the Defendant, first party, to set off the amount of the decree of the Plaintiff against his own decree under sect. 246 of the Code of Civil Procedure, or not?" Subsequently he settled further issues of fact? He said:—"To-day the arguments of the pleaders for both parties on the first issue were heard. After hearing the arguments of the pleaders for both parties, I come to the conclusion that issues on facts also ought to be framed; that after receiving the evidence I shall try, on all the issues, as to whether this sale has been held fraudulently or not, and determine whether, in case fraud be proved, a regular suit will lie for cancelment of the sale in question." Then he settled the following issues of fact:—"1st. Did the Defendant No. 1 take the proceedings for execution of decree and service of attachment processes and a sale notification fraudulently (and) surreptitiously, with a view that the Plaintiff might not be aware of it; or were the proceedings of execution of decree and the issue of attachment processes and sale notifications executed in a *bonâ fide* manner without fraud? 2nd. Is the Defendant No. 2"—that is the present Appellant—"furzi for the Defendant No. 1 in the auction purchase, or is he the real purchaser; and were the Defendants Nos. 2 and 3 aware of the fraud stated by the Plaintiff at the time of the auction purchase or not? 3rd. Has the property sold at auction been sold for a small value owing to the fraud alluded to, or not?" Those issues came on for trial. Witnesses were heard on both sides, and the Judge delivered judgment, by which, after stating that the pleas in bar were overruled by his predecessor, he decided in favour of the Defendants. With regard to the principal point as to the fraud, he said:—"There is no proof of the allegation that *Khoob Lal* purchased the share in question in the name of *Rewa Mahton*." And again:—"In my opinion *Rewa Mahton* is the real purchaser, who made the other Defendant, *Omed Ali*, a partner in his purchase. I do not think that *Khoob* has any

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interest in the property." He also held that the property was not sold for an inadequate price. An appeal was preferred to the High Court, and that Court, without entering into the question of fraud or no fraud, but assuming that the Defendant, the present Appellant, was a *bonâ fide* purchaser at the sale, proceeded to consider the question whether the sale in execution was valid or not in consequence of the Moonsiff's having granted *Khoob Lal's* execution when the Plaintiff held a decree for a larger amount against him.

That question depends upon sect. 246 of the Code of Civil Procedure, Act X. of 1877, which enacts as follows:—"If cross decrees between the same parties and for the payment of money be produced to the Court"—that is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not,—"execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum, as well as satisfaction on the decree for the smaller sum." In this case the Plaintiff's decree was not brought before the Court when *Khoob Lal* applied for execution. At that time he brought before the Court only his own decree, and the Court ordered that an attachment should issue to satisfy his judgment for Rs.661, and the property was attached. We cannot in this suit enter into the question whether the decisions upon the petition to set aside the sale under sects. 311 and 312 were correct or not. Those decisions cannot, in consequence of sect. 312, be impeached in this suit on the ground of any irregularity which was the subject of those decisions.

The High Court determined the question simply upon sect. 246. They said: "The provisions of sect. 246 are explicit, that if cross decrees between the same parties and for the payment of money be produced to the Court, execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum. It was not competent to the Moonsiff by his judgment to modify this provision of the law, even if it were his intention to do so, which is by no means clear." The High Court does not say that

the decree of the Plaintiff was brought before the Moonsiff, or that the two decrees were before him at the time when he awarded execution for the smaller decree. They go on—"Nor does it appear to us that there was anything in the Plaintiff's conduct which could render legal and valid proceedings of the Defendant, which were without the sanction of law. When the Defendant on the 31st of August applied for execution of his cross decree for a smaller amount he must have been aware that the Plaintiff's decree had been produced to the Court, and that since the order of the Appellate Court, the 26th of July, 1878, it was capable of execution. The Defendant accordingly had no right to execution, except as provided by sect. 246, and the whole of the subsequent proceedings taken in execution of the Defendant's decree were, in our opinion, a nullity, and must be set aside." The Court, therefore, notwithstanding the finding of the Lower Court that the Defendant—the present Appellant—was a *bonâ fide* purchaser at the sale under the execution, and without themselves entering into the question of fraud or no fraud, held that the execution issued by the Moonsiff, and all the subsequent proceedings, were a nullity, and must be set aside. The Defendant Appellant purchased *bonâ fide*, and for a fair value, property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment.

Their Lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of sect. 246, and that the judgment of the High Court in that respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgment debtor had a cross judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues.

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It would have been more satisfactory if in this case, which was one appealable to Her Majesty in Council, the High Court had not decided the case merely upon the construction of sect. 246 without expressing their opinion upon the other issues which were raised and determined by the Subordinate Judge. Their Lordships, being of opinion that the decision of the High Court with reference to sect. 246 is erroneous, have been obliged to determine the other issues, and for that purpose to go through the evidence in the absence of the Respondent, who did not appear before them on the argument of the case, without having the advantage of any expression of the High Court's opinion as to the effect of that evidence. If the High Court had determined the other issues and had concurred with the Subordinate Judge in his findings, the case would have fallen within the rule of concurrent findings of fact, and the examination of the evidence by their Lordships would in all probability have been unnecessary.

Their Lordships having examined the evidence very carefully, have come to the conclusion that the Subordinate Judge was correct in holding that there was no fraud; that the Defendant was a *bonâ fide* purchaser under the execution; and that the property was not sold for an inadequate price.

Under these circumstances their Lordships will humbly advise Her Majesty to dismiss the appeal to the High Court with costs, to reverse the judgment of that Court, and to affirm the decision of the Subordinate Judge. The Respondent must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

SAYYID MANSUR ALI KHAN . . . PLAINTIFF;

AND

BABU SARJU PARSHAD . . . . . DEFENDANT.

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ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Regulation XVII. of 1806, *ss.* 7 & 8—*Right to redeem—Regulation must be strictly followed.*

In those parts of *India* where *Bengal* Regulation XVII of 1806 is in force the right to redeem a mortgage by conditional sale is governed entirely by the Regulation and not by the terms of the condition.

Where within a year after service of the notification of a foreclosure petition the mortgagor deposited the principal debt and interest for the last year, alleging that interest for the previous years was according to the condition to be recovered by separate suit:—

Held, that his suit for redemption must be dismissed. There had been default in payment of the interest due, and by sect. 8 the mortgage, notwithstanding the condition relied upon, had been finally foreclosed.

APPEAL from a decree of the High Court (Jan. 23, 1883) reversing a decree of the Subordinate Judge of *Gorakpur* (April 9, 1881).

The suit was for redemption of certain villages belonging to the Plaintiff which had been mortgaged by way of conditional sale without possession given to the Defendant, by the Plaintiff's deceased brother and predecessor in estate on the 14th of March, 1868.

There was no dispute as to facts, and the only question was as to whether on the due construction of the instrument of mortgage or conditional sale, it should be held that the deposit in Court made by the Plaintiff during the year of grace allowed by Regulation XVII. of 1806, s. 8, of a sum equal to the principal debt, and one year's interest was sufficient to entitle the Plaintiff to redeem, or whether he was not bound to deposit also the interest due for two preceding years, together with interest thereon.

The Subordinate Judge held the deposit made by the Plaintiff

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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to be sufficient and gave him a decree accordingly for redemption.

The High Court held it was insufficient, and allowing the appeal, directed the suit to be dismissed with costs of both Courts.

Cowie, Q.C., and *Doyne*, contended that the deposit was sufficient to prevent foreclosure, according to the true construction of the instrument. The High Court was not justified, the Regulation did not authorize them, in adding to the terms of that instrument, and thus varying the conditions upon which the mortgage had been effected. Reference was made to *Forbes* v. *Ameerunnissa Begum* (1), where the general law on the subject is stated.

Raikes, and *Dunlop Hill*, for the Respondent were not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought by the Appellant for the redemption of a mortgage made by his deceased brother, *Sayyid Zahur Ali Khan*, to whose estate the Appellant had succeeded by inheritance. The mortgage was by a conditional sale to the Respondent, dated the 14th of March, 1868, to secure the payment of Rs.11,200 which had been borrowed by the mortgagor, and interest thereon at the rate of Rs.1 4*a*. per cent. per mensem, being Rs.1680. The condition was, that the interest should be paid annually for seven years, with compound interest if it was not paid at the stipulated periods, to be realised from the person and property of the mortgagor, and the principal sum of Rs.11,200 and Rs.1680 on account of interest for the last year was to be paid on the 6th Badi Chait (March 28, 1875). On the 23rd of April, 1875, after the expiration of the time fixed, the mortgagee filed a petition under the *Bengal* Regulation XVII. of 1806, in which he claimed Rs.17,304 7*a*. as due for principal and interest, being the principal sum and three years' interest and compound interest thereon.

(1) 10 Moore, Ind App. Ca 340–348.

A notification was thereupon issued by the Judge according to the Regulation, but the service of it was not effected till the 20th of January, 1880. On the 17th of January, 1881, the mortgagor deposited in the Judge's Court Rs.12,881, the principal sum and interest for the last year, with a petition alleging that the interest for the previous years was, according to the condition, to be recovered by a separate suit, and on the 20th of January, 1881, he brought this suit.

The Lower Courts have given judgments at considerable length upon the construction of the mortgage deed, the Subordinate Judge holding that the Appellant was entitled to redeem, and the High Court reversing that decision and dismissing the suit. It does not appear to their Lordships to be necessary to consider the construction of the deed. In the part of *India* where the Regulation is in force, the right to redeem depends entirely upon it. The words of sect. 7 are, that where the mortgagee has not been put in possession of the mortgaged property (which was the case in this mortgage), the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor to the redemption of his property before the mortgage is finally foreclosed in the manner provided by the 8th section. That section gives the mortgagor one year from the date of the notification to redeem the property, and says that if he does not do so in the manner provided by the 7th section, the mortgage will be finally foreclosed and the conditional sale will become conclusive. It could not be denied by the Appellant's counsel that much more than one year's interest was due. Indeed the arrear of interest had continued to increase from the 23rd of April, 1875, till the date of the deposit. The mortgagor had clearly not done what was necessary by the terms of the Regulation to entitle him to the redemption and for that reason their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The Appellant will pay the costs of it.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for respondent: *Oehme & Summerhays.*

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RAMCOOMAR GHOSE AND OTHERS . . . DEFENDANTS;

AND

KALI KRISHNA TAGORE . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Accretion of Chur—Measurement—Construction of Kabulyat—Assessment of Rent—Act VIII. of 1869 (B.C.), s. 14.

Where a kabulyat stipulated that on the accretion to a certain howla of any new cultivable chur, a fresh measurement should be made of the chur and howla, and that excess rent should be paid for the excess land at a stipulated rate up to five drones, and at pergunnah rates for the residue; in default thereof rent to be realized according to law, or service made on the tenants of a notice "requiring them to take a settlement of the excess land and to file a kabulyat, and fixing the time at fifteen days," otherwise the excess land to be settled with others;—the kabulyatdar measured the howla and accreted chur without notice to the tenants and in their absence, then served on the tenants a notice thereof, and of the increased rent demanded, requiring them to appear within fifteen days and file a kabulyat for the said amount of land and rent, or that he would take khas possession.

In a suit, amongst other things, for assessment of rent of the excess land:—

Held (1) that sect. 14 of Act VIII. of 1869 (B.C.) did not apply.

(2.) That the tenants were not bound by the measurement made by the kabulyatdar in their absence.

(3.) That the kabulyatdar was entitled to a decree fixing the extent of the excess land, and assessing the rent payable for it; and thereafter entitled to issue a fresh notice to the tenants to come to a settlement in respect thereof, or give up possession.

APPEAL from a decree of the High Court (May 11, 1883), reversing a decree of the Subordinate Judge of *Faridpore* (June 29, 1881), which had dismissed the Respondent's suit with costs.

The decree of the High Court (*Cunningham* and *Maclean*, JJ.) was to the effect that the Respondent should have khas possession of certain of the lands in suit to be ascertained by reference to a map made by the Court Ameen.

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellants.

* *Present*:—LORD WATSON, LORD HOBHOUSE, and SIR BARNES PEACOCK.

Leith, Q.C., and *Doyne*, for the Respondent.

Jardine, Skinner & Co. v. *Rani Surut Soondari Debi* (1); *Shadhoo Singh* v. *Ramanoograha Lall* (2); *Jadubchunder Haldar* v. *Etwaree Lushkur* (3), were referred to.

The judgment of their Lordships was delivered by

LORD WATSON:—

The arguments upon this appeal had reference mainly to the construction of the following stipulations in a kabulyat, dated the 23rd of April, 1850, executed by the then tenants, under a howladari tenure, of certain lands comprised in "the chur to the east of *Makhuakhali*," forming part of the zemindary now belonging to the Respondent:—

"If a new chur accretes contiguous to the aforesaid howla, and as *hakiat* of the aforesaid (torn), and no revenue is assessed thereon by the Government, then, when the said chur becomes fit for cultivation, a fresh measurement shall be made of the land of the said chur and of the aforesaid howla; and after a deduction of the aforesaid 13. 6. 16 gundahs of land, we shall pay rent at the rate of Rs.2 7*a*. 7*p*. for the excess of land up to five drones, and at the *sara* (prevailing) pergunnah rates for land exceeding that quantity. If we fail to do so, the rent will be realized according to the law for the realization of rent, with interest on lapsed instalments according to the demands of the towzi of the said pergunnah; or at the close of the year, you will serve on the spot, and on some conspicuous place in the *mahakuma* (head-quarters) of any hakim, an itlanama (notice) to our address, requiring us to take a settlement of the said excess land, and to file a kabulyat, and fixing the time at fifteen days; if, thereupon, we do not appear before you and take a settlement and fix a kabulyat, you will settle the said excess lands with others."

The 13. 6. 16 gundahs thus referred to was the original extent of the cultivable howla, and the rent payable for it was fixed by the kabulyat at Rs.462. In a suit brought by the zemindar in

(1) Law Rep 5 Ind. App. 164. (2) 9 Suth. W. R. 83.
(3) Marsh. 498.

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the year 1865, it was found that 2. 11. 13 gundahs, &c., had accreted to the said 13. 6. 16 gundahs, and that for such excess additional rent was payable at the rate of Rs.2 7*a.* 7*p.* per khani in terms of the kabulyat of 1850. The Appellants have since continued to be tenants of the howla and said accreted lands, amounting in all to 16. 2. 9 gundahs, &c., at a *cumulo* rent of Rs.570 1*a.* 1*p.*, &c.

It is not matter of dispute that, at the commencement of the year 1876, a new chur had accreted to the howla in question, which was to a large extent composed of land fit for cultivation. The Respondent alleges that, in April of that year, a new measurement of the original howla and of the accreted chur was made by his servants under his instructions. The measurement was made without intimation to the Appellants, and in their absence. The Respondent thereafter, on the 28th of March, 1878, caused a notice to be served on the Appellants, who are the registered tenants of the howla, setting forth the fact of measurement, intimating the precise amount of the increased rent due in respect of the excess land, according to the rates specified in the kabulyat, and requiring the Appellants to appear, either before himself or his principal officer, within fifteen days from service, "and file a kabulyat for the said quantity of land and for the said amount of rent; otherwise after the expiry of the said fixed period, under the terms of the said kabulyat, I shall take khas possession of the land in excess of the said Dr. 16. 2. 9 gundahs of land, for the purpose of settling the same with others."

The Appellant paid no attention to the notice, and the Defendant, on the 29th of March, 1879, presented his plaint to the Subordinate Judge, in which he prayed, (1), that the Court should direct a measurement of the excess land and give him khas possession thereof; or otherwise, (2), that the Court should, in the event of its declining to give him possession, assess the rent of the excess land payable under the kabulyat. On the Respondent's motion the Judge ordered a measurement of the accreted land, which was made by the Court Ameen in presence of the parties, and duly reported. Evidence was then led on both sides, and, on the 29th of June, 1881, judgment was given dismissing the suit with costs, but the formal decree was not made

out and signed until the 27th of July, 1881. The Subordinate Judge came to the conclusion, though with some hesitation, that service of the notice of the 28th of March, 1878, was established. He was of opinion that the Respondent had failed to prove any measurement of the excess lands as alleged, and had also failed to prove pergunnah rates, both of which he held to be conditions precedent of the Respondent's right to possession. And, as matter of law, the learned Judge decided that the stipulation in the kabulyat with respect to khas possession, which he terms the forfeiture clause, is void. The learned Judge further held that the suit, so far as it prayed for assessment of rent, could not lie, inasmuch as the case was regulated by sect. 14 of the *Rent Act*.

On appeal the decision of the Subordinate Judge was reversed by the High Court, consisting of *Cunningham* and *Maclean*, JJ., who, on the 11th of May, 1883, gave the Respondent decree for khas possession of whatever land may be found, according to the Civil Court Ameen's map, to be in excess of 16*d*. 2*k*. 9*g*. 2*c*. 2*k*. Unfortunately the Ameen reports two measurements on the map prepared by him, leaving it to the Court to select one or other of them, and the decree does not specify according to which of these the excess lands are to be ascertained.

The learned Judges of the High Court differed in opinion from the Subordinate Judge, as to the fact of a measurement having been made by the Respondent before the notice of the 28th of March, 1878, was served. They state that, upon the evidence, they are "unable to find that there has not been a measurement within the terms of the kabulyat." Upon that view of the facts they seem to have been of opinion that, on receipt of the notice, the Appellants ought to have appeared within the fifteen days, and to have then stated any objections which they had to the measurement or to the rent intimated, and that, seeing they raised no objection to either until the present suit was instituted, the Respondent was entitled to the alternative of possession.

Their Lordships are of opinion that the Subordinate Judge erred in holding that the provisions of sect. 14 of the *Rent Act* apply to the additional rent, which is stipulated in the kabulyat of 1850. There is nothing in the terms of that document, or of

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sect. 14 of the *Rent Act*, which can oust the jurisdiction of the Court, either in regard to the measurement of the excess land, or the assessment of the rent which is to be paid for it. It is stipulated that before excess rent is payable, and before the zemindar can call upon his tenants to choose between making a settlement and yielding possession to him, there shall be a measurement, but the document does not specify by whom that measurement is to be made. If the Respondent had given the Appellants full notice of his intention to make a new measurement, so as to enable them to be present, if they saw fit, at the time it was made, that would have cast upon them the duty of appearing before him within fifteen days after the notice was served; and if they had failed to appear within that period, the Court, if satisfied that the measurement was made in good faith, would probably have held them precluded by their own laches from objecting to it. But the Respondent gave them no intimation of his intention to measure; and, in the notice which he served, he did not require them, in terms of the kabulyat of 1850, "to take a settlement of the excess land, 'and to file a kabulyat,'" but called upon them within fifteen days to "file a kabulyat for the said quantity of land, and for the said amount of rent." The difference between these two requisitions is not one of form merely, but of substance. What the deed of 1850 contemplates is that after a measurement has been made, within the knowledge of the tenants, and to which they ought therefore to be prepared to state specific objections, they may be required to come in and say whether they are or are not willing and ready to take a lease of the excess land. It does not contemplate that the new kabulyat must of necessity be executed within the fifteen days. It is obvious that, after the tenants have come in, and have agreed to take a lease of the excess land, they and the proprietor may differ both as to the precise extent of the land and as to the rent to be paid for it; and in that case their differences must be settled by the Court. On the other hand, their Lordships are of opinion that, under the terms of the kabulyat of 1850, the proprietor is not precluded from bringing his suit, without taking any preliminary step, in order to have an authentic measurement made, and the rent assessed; but, in that case, he cannot put the

tenants to their election between paying rent and giving up possession until both these things have been done judicially.

In the present case their Lordships are of opinion that the measurement of 1876, without intimation to the Appellants, coupled with the peculiar terms of the notice of March, 1878, is not *per se* sufficient to entitle the Respondent to insist in his claim for khas possession of the excess land, as now ascertained by the measurement of the Court Ameen. But the Respondent is, in their opinion, entitled to have a decree, in terms of the alternative prayer of his plaint, fixing the extent of the excess land, and assessing the rent payable for it, in terms of the kabulyat of 1850. Their Lordships are unable to concur in the finding of the Subordinate Judge, to the effect that the Respondent has failed to prove "the prevailing pergunnah rates" within the meaning of the kabulyat. The evidence on both sides clearly shews that there is not now, and probably never was, any such thing as a fixed scale of rents for lands like these within the pergunnah, but that circumstance does not warrant the conclusion that no pergunnah rate has been proved. It leads to the inference that the parties to the kabulyat must have contemplated payment of a fair rent, to be computed according to the average of rents paid by the tenants of similar lands within the pergunnah, due regard being had to the nature of the tenure. Their Lordships are of opinion that, taking into account the character of the Appellants' tenure, the pergunnah rate ought, for the purposes of this case, to be fixed at Rs.6. 4*a*. per khani.

In the absence of any evidence enabling them to decide between Statements A and B contained in the report of the Court Ameen, their Lordships are of opinion that (the onus being upon the Respondent) the measurements given in statement B must be adopted as correct. They are further of opinion that the increased rent now assessed ought to be paid by the tenants for their possession, from and after the date when the Respondent's notice was served upon them.

It will be necessary to remit the cause, in order that the precise extent of excess land for which rent is now payable, and also the precise amount of the increased rent may be ascertained

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in the Court below, and decree given accordingly. When that has been done, it will be in the option of the Respondent, either to realize the rents in terms of law, or to serve a fresh notice in terms of the kabulyat of 1850; and, if the Appellants do not come in and make a settlement and file a new kabulyat, he will then be entitled to khas possession of the excess land which has accreted to the original howla, and to the lands for which increased rent was found to be payable in the suit No. 178 of 1865.

The parties to this suit seem to have maintained in the Courts below, as they certainly did in this appeal, pleas far in excess of their respective legal rights, the Appellants succeeding before the Subordinate Judge, and the Respondent, in his turn, succeeding before the Court of Appeal. In these circumstances, it appears to their Lordships that there can be no injustice done by deciding that each of them ought to bear their own costs.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the High Court appealed from, dated the 11th of May, 1883, save in so far as it sets aside the decree of the Lower Court, dated the 27th of July, 1881, and to find that neither the Appellants nor the Respondent are entitled to the costs of suit incurred by them in either of the Courts below; to declare (1) that the Respondent ought to have decree ascertaining the extent of excess lands in the possession of the Appellants, and assessing the rent payable therefor, in terms of the kabulyat dated the 23rd of April, 1850; (2) that for the purpose of ascertaining the extent of the said excess land, the measurements contained in Statement B annexed to the report by the Ameen of the Subordinate Judge's Court are to be taken as correct, and that from the total area of land in the possession of the Appellants ascertained by the said Ameen to be cultivable and properly assessable with rent, there must be deducted 13*d.* 6*k.* 16*g.*, the extent of the original howla as fixed by the said kabulyat, the balance remaining after such deduction representing the extent of excess lands for which rent is payable; (3) that the rent payable for the excess lands ascertained as aforesaid is at the rate of Rs.2. 7*a.* 7*p.* per khani for five (5) drones thereof, and for the remainder thereof at the rate of Rs.6. 4*a.*

per khani; (4) that rent became payable in respect of the said excess lands from and after the 28th day of March, 1878; and, subject to these declarations, to remit the cause to the Court below.

There will be no costs of this appeal.

Solicitor for Appellants: *A. H. Wilson.*

Solicitors for Respondent: *Wrentmore & Swinhoe.*

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AND

KRISHNA COOMAR BUKSHI . . . . . DEFENDANT.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Principal and Agent—Suit for an Account—Limitation runs from Cessation of Agency—Duty of Court with regard to Decree.

Where a plaint alleged a continued agency in the Defendant and prayed for relief on the ground that there was a specific balance against him, and prayed for the recovery of such sum or any larger sum that might be proved to be payable:—

Held, that such suit was essentially one for an account; that limitation under Act IX. of 1871 runs from the date on which the agency ceased; that the Court following the general rule ought not to make a final decree at the hearing, but should order an account to be taken of such agent's dealings with the Plaintiff's money.

Where a Defendant instead of submitting to an account falsely denies his receipts, his fiduciary position, and his accountability *in toto*, *held* that he should be directed to pay the whole costs of the suit, independently of the result of the account.

APPEAL from a decree of the High Court (Feb. 18, 1881) dismissing the Appellant's suit with costs; thereby in part reversing a decree of the Subordinate Judge of *Rajshahye*, dated the 11th of September, 1878, which was in favour of the Appellant, to the extent of Rs.1369, with proportionate costs, but dismissed the suit as regards the balance of his claim, with costs proportionate thereto.

The suit was brought against the Respondent on the 1st of

* *Present.*—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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June, 1877, and was described by the High Court as "virtually for an account of various sums of money drawn by him, or disbursed by his authority from the Plaintiff's treasury in the course of his service as dewan. But in form the action is to recover Rs.19,925 14*a*., alleged to have been misappropriated by the Defendant."

The effect of the Defendant's written statement, after pleading limitation, and that the Plaintiff's accounts were inadmissible in evidence, as being unstamped, was to deny the receipt of the moneys alleged in the plaint, to deny misappropriation, or any liability in respect thereof. The Defendant alleged that all disbursements were made by authority of the Plaintiff. In his evidence he admitted that he gave no accounts. The issues were in accordance with the above contentions. Neither in them, nor in the written statement, was the question raised whether the Defendant had in fact duly accounted, either by himself or by others.

Both Courts found as facts that the Defendant was the Plaintiff's agent and disbursed the Plaintiff's money on his own authority, large sums having come to his hands for that purpose, and that he had not himself accounted.

The mode in which they respectively dealt with the case on the above-mentioned findings was as follows: The Subordinate Judge held that "there can be no doubt, too, that the expenditure connected with the two-annas case was subject to the control of the Defendant." But he added—"most of the disbursements in the two-annas case were made through *Tarini Kant Chuckerbutty*, the Plaintiff's sudder naib and general mokhtar, and this is written." He found that *Tarini Kant* had filed certain jumma khurruches in the Plaintiff's serishta, and that if the Plaintiff had filed them, it would appear what sum had been expended through *Tarini Kant*, and what sum had been expended through the Defendant. Further, that the Plaintiff had sued *Tarini Kant* for an account, and had included in that suit a sum of Rs.6725 also included in this suit, and that the khazanchi (treasurer) had deposed that the Defendant was not liable to account for those items against which he did not put his mark. He found that the Defendant had only put his mark to items the total of which was

Rs.4388, and that he had not been able to give any proof of the proper expenditure thereof. He held that the above Rs.4388 had been misappropriated, and, after allowing certain sums, as set off, he decreed in favour of the Plaintiff, for Rs.1369, holding that the rest of the money had been expended in the Plaintiff's business.

The High Court, in reference to the finding of the Lower Court that "the greater part of all the money taken under the head of the two-annas case was actually spent thereupon, and that the Plaintiff was in possession of accounts shewing the details of such expenditure," held, that in the absence of the complete accounts, that is the jumma khurruches rendered by those who took advances, including the jumma khurruches rendered by *Tarini Kant*, it was impossible to fix the amount (if any) of the Defendant's liability, and impossible to say how much (if any) of the sums advanced, remained unaccounted for.

"We have the direct evidence of *Tarini Kant Chuckerbutty*, the naib, that at least a very large portion of the expense incurred in the two-annas case, he says Rs.30,000 or Rs.35,000, passed through his hands, and that he rendered to the Plaintiff a jumma khurruch of that amount. If this be so, that jumma khurruch was an essential document to be produced in this case, and it seems impossible but that the Plaintiff did require such a jumma khurruch to be laid before him from time to time. If he did not require it then it is scarcely reasonable to expect to get it now, so many years afterwards. If he did get a jumma khurruch, as alleged by *Tarini Kant*, we must presume from his long silence that he acquiesced in it."

Doyne, and *Cowell*, for the Appellant, contended that this was plainly a suit for an account, that the High Court ought to have remanded the suit to take the account, and that it was impossible to do justice between the parties and pass a final decree until that had been done. The High Court itself regarded the suit as one for an account, and the parties had so treated it both in their pleadings and their memoranda of appeal and cross appeal.

As regards the Respondent being exonerated from liability to account, by reason of *Tarini Kant* having filed certain jumma

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khurruches which were not produced, such was not the case made by him in his written statement, or in the issues. It was stated in the memorandum of appeal, and not contradicted in the memorandum of cross appeal, that the Plaintiff had no notice to produce them. The treasurer and poddar, who were closely examined as to the accounts, were not cross-examined upon this subject, the suggestion there being that the treasurer himself was liable to account. In none of the twenty-eight depositions on behalf of the Plaintiff, was there any suggestion, in cross-examination, to the above effect. The only reference to the subject was in *Roop Chunder Shaha* (the treasurer's) deposition, who says at the end, in answer to the Court, "*Tarini Chuckerbutty*, the mokhtar, was liable to give an account of monies to the Defendant."

It was neither found, nor suggested, that the accounts filed by *Tarini Kant* were authorized by the Defendant, complete, vouched, or explained; still less that there was any proof given that the expenditure had been rightly and properly incurred. And it was submitted that the Defendant's case having all along been, that he never received the moneys in suit, and never accounted for that, no such presumption as the Courts below made arose that he did, in fact, account through *Tarini Kant*, or that such account, if rendered, and so far as it was rendered, was acquiesced in by either the Appellant or Respondent so as to be mutually binding upon both.

Consequently the Plaintiff ought not to have been refused all remedy, but was and is entitled to a decree that the Defendant render an account of the moneys come to his hands, and that, for that purpose, the suit should have been remanded to the Lower Court, with directions that such account be taken in the usual manner.

The Respondent did not appear.

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July 24.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiff in the suit, who is the present Appellant, is the owner of a large estate, and the Defendant acted as his dewan for some twenty years or so. Some months before the institution of

the suit, the Plaintiff demanded an account of the Defendant's dealings, but the Defendant left the place without rendering any. In June, 1877, the plaint was filed. After stating the Defendant's position and duties as dewan, the Plaintiff alleged that he had taken money out of the treasury in the year 1866, and at other times, and had misappropriated it. He then specified certain sums taken, and certain allowances to which the Defendant was entitled, and concluded thus:—"There is a balance against him of Rs.19,925 14*a.* for the recovery of which I institute this suit. If by the decision of the Court a larger sum should be proved to be payable to me by him under proofs and papers, the prayer is also for recovery of the same."

The High Court has said that this is a suit virtually for an account. Their Lordships agree with that view. They think that, though the pleading may not be quite precise or technical, it is impossible to assign any other character to a plaint alleging a continued agency in the Defendant for the purpose of drawing and expending the Plaintiff's money, and praying relief on the ground that the agent had drawn from his principal more than he had expended for him. To such a claim by a principal, the agent may answer that accounts have been settled between him and his principal, or that, though none have been settled, he has in the course of his agency applied for the principal's benefit as much as he has received or more. Nothing could prevent the Defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the Plaintiff claims it if a larger sum than he specifies should be found due to him. Such a suit is essentially one for account.

In his written statement the Defendant did not set up the defence of settled account, nor that the account when taken would be in his favour. He denied his accountability altogether. He denied the receipts of money which were ascribed to him, and alleged that all the expenditure was effected through the Plaintiff's own treasurer and poddar, agreeably to his own instructions. As for the papers produced from the treasury to shew drawings of money by the Defendant, he charged that they were false and fabricated. Such a line of defence was perfectly legitimate, if true; but it has been found by both the Subordinate Judge and

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the High Court to be false. The Subordinate Judge finds the Plaintiff's treasury accounts to be genuine, and he finds further that in the majority of instances the Defendant expended the Plaintiff's money without his authority, meaning, as their Lordships understand, that he expended the money by his own general authority as dewan, and did not take the Plaintiff's orders for each specific payment. As regards amount, the Subordinate Judge finds that, setting aside two smaller sums which have been sufficiently accounted for in the suit, two larger sums, amounting altogether to Rs.40,353 8*a*. are proved to have come into the hands of the Defendant.

Such findings as these establish a relationship between the Plaintiff and the Defendant under which the latter is accountable for his receipts. Their Lordships think that the regular course would have been to order an account to be taken of the Defendant's dealings with the Plaintiff's money as his dewan or agent. In taking the account either party might waive inquiry as to particular periods of time or particular departments of expenditure, and that is often done. But neither could shut out the other from inquiry into any part of the Defendant's transactions as dewan. In such an account the agent is *primâ facie* liable for what he has received, and is bound to discharge himself; but the evidence which is considered sufficient to discharge him may vary as to different items, and he certainly would be entitled to all such intendments and presumptions as are made in favour of one who is called upon to render an account of transactions which have taken place long ago, though under circumstances which prevent any absolute bar by lapse of time.

The Court, however, seems to have thought that its duty was to make a final decree at the hearing upon the items specified in the plaint and the accounts appended to it. And taking a distinction between sums for which the Defendant had marked papers and other sums for which, though paid to him or to his order, he had not marked, the Court found that a sum of Rs.1369 was due to the Plaintiff, and made a decree for that amount, apportioning the costs of the suit rateably according to the proportion of the amount claimed to the amount recovered. Both parties appealed to the High Court, who dismissed the suit

altogether with costs. The present appeal is from that decree. The Defendant has not appeared, so that the hearing has been *ex parte*, and the evidence bearing on the points now material has been minutely examined. Their Lordships have now to weigh the reasons assigned by the Courts below for their decrees.

It is first necessary to deal with the plea of limitation, which is raised by the Defendant, and which is governed by Act IX. of 1871. Both Courts have decided that there is no such bar in this case. The only articles suggested as applicable to it are those numbered 60, 90, and 118. Their Lordships think it sufficient to say, with both Courts, that time must be counted from the date on which the Defendant ceased to discharge the duties of dewan by departing from the Plaintiff's service, and, therefore, whether three years or six years be the limit, there is no bar.

The principal reason assigned by the Subordinate Judge for his conclusion is that the Defendant's mark appears on some of the sehas which shew advances made to him or to his orders, and does not appear on others. And he cites the Plaintiff's treasurer as saying that he was released from liability for the marked items, but was liable for the unmarked ones, and that the Defendant was not liable for them. The treasurer's evidence shews that the payment of money on the Defendant's orders without his mark was an irregular procedure not giving to the treasurer complete immunity from responsibility. But they cannot find that he has anywhere said that the Defendant was not responsible to the Plaintiff for the money paid out on his orders; and if he had said so it would be a mistake of law. The Subordinate Judge was in error when he held that the Defendant was not bound to discharge himself of all the sums which he ordered to be drawn from the treasury.

The only other reason assigned by the Subordinate Judge is that most of the disbursements in some lawsuits called the two-anna case were made through *Tarini Kant*, the Plaintiff's general mokhtar; that *Tarini Kant* had filed accounts in the Plaintiff's treasury which the Plaintiff had not produced; and that the Plaintiff had sued *Tarini Kant* for an account, and had claimed against him the sum of Rs.6725, which again was claimed in the present suit.

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It is not quite clear what the Subordinate Judge considered to be the exact bearing of *Tarini Kant's* interventions in these matters. He did not apply them so as to discharge the Defendant of any specific items of charge. And if he thought that the Plaintiff was bound to clear up his dealings with *Tarini* before he could charge the Defendant with money taken for the two-anna case, it is difficult to see why such an objection as that does not apply to marked items as well as to unmarked. The High Court appear to have so applied it, and they are logical and consistent in doing so. But it is necessary to see whether the existence of unproduced accounts between the Plaintiff and *Tarini* supplies any reason why a decree for account should not be made between the Plaintiff and the Defendant. If it does, it appears to their Lordships that the Plaintiff was harshly treated in not being allowed an opportunity to produce them. For the Defendant did not rely upon them in his written statement, did not call for their production, and apparently did not ask the Plaintiff's witnesses any question about *Tarini Kant* except a quite general one put in the cross-examination of the treasurer. This is one of the circumstances shewing what miscarriages are likely to occur if the Court attempts to make a final decree at the hearing of a suit for account, instead of the regular decree for account.

The Plaintiff's suit against *Tarini* was instituted almost simultaneously with his suit against the Defendant; and both were before the Subordinate Judge of *Rajshahye*. The suit was for an account, and the Plaintiff charged *Tarini* with receiving as mokhtar on various accounts the sum of Rs.17,677 7*a*. 6*p*., of which he had properly spent no more than Rs.17,227 6*a*., leaving Rs.450 due from him on those accounts. He also alleged a misappropriation of Rs.800 on accounts of which the items were not specified by him, or which do not appear in the present record. *Tarini* admitted the receipt of some amounts, denied the receipt of others, and claimed a balance due to himself on the account. The suit was compromised in the year 1878, and was dismissed, each party paying his own costs.

With regard to the sum of Rs.6725 which the Subordinate Judge says the Plaintiff has sought to recover against both *Tarini* and the Defendant, their Lordships cannot find such a sum; but

it is perhaps a misprint for the sum of Rs.6525 which appears in the accounts of both suits. In the *Tarini* suit it is charged as received by him by way of instalment on the 23rd of Aughran, 1280, but it is part of the accounts upon which only Rs.450 is claimed, and therefore it must be almost, if not wholly, written off in the legitimate expenses which the Plaintiff allows to *Tarini*. In the present suit a sum of Rs.6525 is charged against the Defendant, as a howlat taken in the name of *Tarini* on the 23rd of Aughran, 1277, but it is wholly written off as part of the legitimate expenses which the Plaintiff allows to the Defendant. Even supposing that there is some error in the dates, and that the two sums relate to the same transaction, their Lordships cannot see that it is proved or probable that the Plaintiff is seeking to recover the same amount twice over. It is very likely that both the dewan and the mokhtar are bound to account to the Plaintiff for the same sum of money,—the dewan because he ordered its payment, the mokhtar because he received it and had the application of it. It is very likely that full accounts could not be stated between the principal and his two agents without including some of the same money in both accounts. That might make it expedient for *Tarini* to be joined with the Defendant as an accounting party; a point which need not now be considered, as no objection has been taken to the frame of the suit on that ground. But the appearance of the same items in accounts against two persons both responsible for them does not shew that the Plaintiff is claiming those sums against both. To shew that, it would be necessary to go deeper into the accounts, and to find that the Plaintiff is trying to get the benefit of the same charge twice over by writing it off against a different set of discharges in each case. Nothing of that kind appears on the record. And their Lordships think that the finding is another illustration of the inconvenience likely to result from making a final decree when a decree for account is the proper one.

The High Court considered that the Plaintiff's evidence was defective. The Subordinate Judge thought that the sehas produced, being rough sheets in the nature of a day-book, were written at the time when the work was being done, and were better evidence than anything copied from them could be. The

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High Court think them only part of the materials for a complete yearly account, such as should be regularly prepared and recorded in a zemindar's office. Yearly accounts of this kind were called for by the Defendant, and none were produced. The High Court attach great importance to the position of *Tarini;* they comment adversely on the non-appearance of the Plaintiff as a witness, and they consider that there must have been some statement of account filed because the word "adai" is written over two of the items of charge. Their conclusion is that it is impossible to say how much, if any, of the sums remains unaccounted for, and therefore the suit must be dismissed. So far do they carry their view that the Plaintiff ought to suffer from not having given the best evidence, that they refuse to give him any relief as to the sum of Rs.4388, though the receipt of it is admitted by the Defendant, who does not shew how it was discharged.

If this were the proper occasion for deciding whether the Plaintiff should recover anything, their Lordships would have to consider long before assenting to the views taken by the High Court. It appears to them that sufficient weight has not been given to the onus thrown upon the Defendant by his fiduciary position. They observe that the treasurer states that there were no such yearly accounts as the High Court suppose. If there are such they may yet be produced, though whether they or the contemporary sehas are the better evidence must depend on circumstances which at present are not known. The Plaintiff excused himself from examination in Court on a plea of ill health, which may have been false. But it was supported by certificates from the civil surgeon of *Rajshahye.* The Subordinate Judge believed it, and he issued an order for a commission to examine the Plaintiff, which, as appears from a petition in the Record, the Defendant prayed to have reversed. On the subject of *Tarini* their Lordships have already made observations.

But all their Lordships wish to do now is to avoid prejudice to a proper inquiry by anything falling from either the High Court or this Committee in the course of what they consider to be a premature attempt to make a final decision. Whatever weight

may be attributed to the reasons given by the High Court for the disallowance of any item of the charge, they are inapplicable to a decree for account. The Defendant is the Plaintiff's agent, and has drawn from his treasury substantial sums of money to be applied in the Plaintiff's business on the Defendant's responsibility. On proof of those facts there is a clear case for an account, in which the Defendant must discharge himself in some way from the money he has drawn. In taking that account any relevant papers in the Plaintiff's treasury may be called for, evidence may be got as to particular items, it may be ascertained whether, as to any item, the Plaintiff has already got the benefit of it in his account with *Tarini*, the appearance of the word "*adai*" may be accounted for, and its effect determined. Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence, as to be ready for decision at that time. But the general rule is the other way. And this suit is an example of the general rule.

Their Lordships are of opinion that the High Court should have remanded the suit to the Subordinate Judge to take a general account of all dealings and transactions between the Plaintiff and the Defendant in the character of the Plaintiff's dewan, only not disturbing any settled account, if such there be. And inasmuch as the Defendant has taken the course of denying his receipts, his fiduciary position, and his accountability *in toto*, a defence which the High Court say is shewn to be false by a mass of evidence adduced by the Plaintiff, he should have been ordered to pay the whole costs of the suit up to and including the appeal to the High Court. If he had been truthful and honest he would have submitted at once to a decree for account, and thus have saved great delay and expense. Their Lordships will now humbly advise Her Majesty to make such a decree, and the Defendant will be ordered to pay the costs of this appeal.

Solicitors for Appellant: *Barrow & Rogers.*

J. C.* LEDGARD AND ANOTHER . . . . . DEFENDANTS;

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AND

July 7, 8, 21. BULL . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF THE NORTH-WEST PROVINCES OF BENGAL.

Act XV. of 1859, *s.* 34—*Sufficiency of Particulars of Infringement—Civil Procedure Code, ss.* 25, 562, 564—*Power of Appellate Court to remand—Order of Transfer.*

The sole object of Indian Act XV. of 1859, s. 34, corresponding with sect. 41 of the English Patent Law Amendment Act, 1852, is to give the Defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself or in a separate paper.

Particulars of breaches must be distinguished from particulars of objection for want of novelty. In the latter case the particular instances may not be within the knowledge of the patentee and must be specified; in the former the Defendant must know whether and in what respect he has been guilty of infringement.

Where three patents of the Plaintiff all related to one article, a kiln for burning bricks, and the second and third in date were for improvements upon the invention specified in the first, and the Plaintiff alleged a particular kiln constructed and used by the Defendant, and in his plaint not only referred to his patents, but indicated in the case of each of them the infringements which he complained of:—

Held, overruling the High Court, that this was a sufficient compliance with the Act.

Talbot v. *La Roche* (1) and *Needham* v. *Oxley* (2) approved.

Where the Court of Appeal sets aside the whole of the previous proceedings in a suit, it cannot direct a new and amended plaint to be filed, but must give the Plaintiff the alternative of having his suit dismissed or of withdrawing it, with leave to bring a new action.

Held, that under sect. 25 of the Civil Procedure Code the superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it.

Peary Lall Mozoomdar v. *Komal Kishore Dassia* (3) approved.

A suit having been instituted in the Court of the Subordinate Judge,

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* *Present:*—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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(1) 15 C. B. 310. (2) 1 H. & M. 248.
(3) Ind. L. R. 6 Calc. 30.

who was incompetent to try it, the same was transferred by consent of parties to the Court of the District Judge for convenience of trial: *held*, that such transference was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the Defendant's written statement and subsequently insisted upon.

CONSOLIDATED APPEAL and cross appeal from an order of the High Court (Feb. 23, 1883) which in effect reversed a decree of the Judge of *Cawnpore* (May 22, 1822) in favour of the Respondent for the full amount claimed, and directed that the Respondent's plaint be amended, presented in the proper Court, and then reheard on the merits, costs being directed to be costs in the cause.

On the 2nd of February, 1882, the Respondent brought his suit in the Court of the Subordinate Judge of *Cawnpore*, which was afterwards transferred to the Court of the District Judge. In his plaint, he alleged, very briefly, the substance of three specifications of invention, filed in 1872 and 1878 under Act XV. of 1859. He alleged that the first invention consisted of a continuous flame kiln for burning bricks, and of a particular method of loading and working such kiln. The description of the kiln was limited to a statement, that in it the continuous action or draught is caused and maintained by the use of moveable iron chimneys placed at intervals in the parts of the kiln where the burning of the bricks is to be effected. The description of the method was, that it consisted of placing the green or unburnt bricks in the kiln, in concentric continuous walls or lines, with parallel open spaces or draught passages between such walls or lines of bricks.

He alleged that the second invention consisted of an improvement in the said kiln, effected by providing vertical holes in the said concentric lines or walls, whereby fuel could be supplied from the top of the kiln by being lowered into the furnace, instead of through furnace mouths in the sides of the kiln, and of "other improvements" not described in the plaint. He alleged that the third invention consisted of a kiln formed by a trench dug into the earth, instead of the usual superstructure.

Then followed the paragraph material to the cross appeal.

5. "The Defendant, *H. C. B. Petman*, has used, and is now using in *Cawnpore*, a kiln, with two sets of operations, similar to that patented in manner above described by the Plaintiff, and in such

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kiln the various inventions patented by the Plaintiff, as aforesaid, have been made and used, without any license from the Plaintiff, who therefore claims Rs.10,000 as royalty and damages."

The Plaintiff did not deliver with his plaint, or at any time during the suit, separate "particulars of breaches."

Accordingly, on the 2nd of March, 1882, upon the case coming up to fix the issues, the Defendant raised that objection, but the Judge held that the plaint contained sufficient particulars for the guidance of the Defendant in framing a reply, and directed him to reply accordingly.

An application was made on the 7th of March, 1882, to the High Court, under sect. 622 of Act X. of 1877, to send for the record and set aside the last-mentioned order (which, it may be mentioned, was not appealable under sect. 588). Three days later, another application was made, that if sect. 622 should not be deemed to apply, the High Court would interfere under sect. 15 of the Charter Act of 1861. On the 20th of March, 1882, the High Court held that sect. 622 did not apply, and rejected the application.

On the 6th of April, 1882, the Defendant, in pursuance of the said order of the 2nd of March, filed his written statement, in which he contended that there was no valid suit before the Court, under Act XV. of 1859, to which he could be called upon to plead in the absence of "particulars of breaches." He denied any infringement, inasmuch as he had burnt bricks on his own process. The damages claimed were alleged by him to be arbitrary, excessive, and contrary to law.

Issues were settled, one being, has the Defendant in any way infringed the patent as described in the plaint. On the case coming up for hearing the Defendant objected to the whole of the evidence with regard to infringement, on the ground that "a distinct and specific statement of the various points in which infringement has taken place should have been given in the particulars—instead of being vaguely alluded to as in paragraph 5."

The objection was overruled, and the depositions of the Plaintiff and of Walter Butler a civil engineer were taken.

At the adjourned hearing the Defendant presented a petition, which, while stating that his counsel had protested vainly at the

time that by admitting the evidence of the Plaintiff the Court had allowed him, the Plaintiff, to supplement the absence of particulars of breaches not filed with the plaint as required by law by evidence orally given by the Plaintiff of such particulars, to the prejudice of the Defendant's just rights of defence as put forward in his written statement, prayed that he might have reasonable notice to file a defence supplemental to his written statement, giving particulars on which he claimed the right to resist the action of the Plaintiff. In the alternative, he prayed that the Court would, without prejudice to those rights, admit evidence to prove that he had manufactured bricks, to all intents and purposes, on his own processes as detailed in the specifications and plans of manufacturing, for which the Government of *India* had granted him an exclusive right in the year 1873 and 1876; and that his mode of setting bricks, and his dampers, and his mode of firing from the top, and his trench system, were no infringements of the Plaintiff's patents.

The Court refused either prayer of the petition, proceeded with the evidence and decreed in favour of the Plaintiff for the full amount claimed.

The High Court, on the appeal of the Defendant, held, on the 23rd of February, 1883, that sect. 34 of Act. XV. of 1859 had not been complied with :—" what is stated on the subject is nothing more than the general allegation contained in the 5th paragraph of the plaint " (cited above). " Sect. 34 further provides 'that at the trial of any such action or issue no evidence shall be allowed to be given in support of any alleged infringement or of any objection impeaching the validity of such exclusive privilege which shall not be contained in the particulars delivered as aforesaid,' so that the Plaintiff came into Court without any case which could possibly be tried. The attempt made at the hearing to shew that the statement in the 5th paragraph of the plaint amounted to notice of particulars as required by the Act was only supported by going into matters which were outside the plaint altogether. How, in the face of such very plain and distinct directions as those contained in sect. 34 of the Act, the plaint should have been framed in its present form it is difficult to understand. The second reason of appeal must therefore prevail;

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but we will allow the Plaintiff another opportunity of a hearing on the merits, and for that purpose we direct that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at *Cawnpore*, and that with the plaint the particulars required by sect. 34 be duly delivered."

The direction with regard to the presentation of the plaint in the proper Court arose in this way. Under sect. 22 of Act XV. of 1859 the suit was cognizable only by the District Court. The plaint, however, was filed in the Court of the Subordinate Judge, and thirteen days afterwards, on the 15th of February, 1882, the District Judge, on the Respondent's application, consented to by the Defendant *Petman*, transferred the case to his own Court, under sect. 25 of Act X. of 1877.

The Defendant thereafter objected, in an intermediate proceeding in the District Court, and in the High Court, to the jurisdiction of the Subordinate Judge to entertain the suit in the first instance, and to the jurisdiction of the District Judge to proceed with it. He renewed his objection, in his written statement, and it was made the subject of an issue, and a ground of appeal. Both Courts decided against it, and held that although the suit had been originally instituted in a Court which had no jurisdiction to try it, its subsequent transfer, as above-mentioned, into the District Court, prevented any further question on that subject being raised. The High Court, however, directed that the plaint should be amended, and presented in the proper Court.

Aston, Q.C., and *Cowell*, for the Appellants, contended that the High Court was right in holding that without particulars of breaches the Plaintiff could not go to trial. This was a case of three patents for a particular process. The patents were inconsistent with one another. If there was any infringement it was by the process of taking one provision from this patent and another from that, and it was essential to the Defendant to know what was the precise combination imputed to him as an infringement. The evidence as to the infringement by a moveable chimney was not covered by the particulars. [LORD WATSON:—The specific kiln on the Defendant's premises is alleged to be an

infringement of the patents. See *Needham* v. *Oxley* (1); *Talbot* v. *La Roche* (2); *Hull* v. *Bollard* (3).] Evidence of objection without particulars is inadmissible: *Sheen* v. *Johnson* (4), and so also of breaches.

Assuming the High Court to be right in that ruling, it ought to have dismissed the suit with or without leave to bring a fresh suit under sect. 373 of the Code. It had no power to remand: see sect. 564, the case not being within sect. 562. But whether the High Court was right or wrong in that ruling, the suit ought to have been dismissed as having been brought in a Court which had no jurisdiction. The District Court had no power to transfer except for convenience of trial. The transfer even if *intra vires* did not give the Plaintiff the benefit of any other jurisdiction than that which he had himself invoked. His consent to the transfer was not of a character to preclude his objection to the jurisdiction which had been consistently maintained from the first.

Reference was made to sect. 22 of Act XV. of 1859, sects. 15 and 25 of the Civil Procedure Code, and to *Peary Lall Mozoomdar* v. *Komal Kishore Dassia* (5).

R. S. Wright, and *Phillips*, for the Respondent, contended that the District Court was right in holding that the plaint contained sufficient particulars of breaches. The time, place, and manner of the infringement were clearly set forth in the plaint. The parts of the patents alleged to have been infringed were described. The specifications and other documents were annexed shewing clearly what was complained of. The kiln itself which constituted the infringement was on the Defendant's premises, he knew the patents and he knew the kiln, and the allegation was that one was an infringement of the other, and he himself best knew how.

With regard to the question of jurisdiction the suit was brought upon the file of the District Court with consent of both parties. Placing it there was equivalent to the institution of a new suit, and it has been heard and determined precisely as if it had been

(1) 1 H. & M. 248.
(2) 15 C. B. 310.
(3) 1 H. & N. 134.
(4) Ind. L. R. 2 All. 380.
(5) Ind. L. R. 6 Calc. 30.

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instituted in the first instance in that Court. The original defect was cured by consent, and even if that were not so, the objection is purely technical, without the least substance in it, and as such will not prevail in the final Court of Appeal. Reference was made to *Ghirdharee Singh* v. *Koolahull Singh and Others* (1). The irregularity, if any, could not have affected the trial on the merits.

Aston, Q.C., replied.

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July 21

The judgment of their Lordships was delivered by

LORD WATSON :—

These appeals are taken in an action of damages for the alleged infringement of certain exclusive rights secured to Mr. *Bull*, the Plaintiff, by three Indian patents; and the whole controversy between the parties depends upon two pleas maintained by the Defendant, the late Mr. *Petman*, who is now represented by his testamentary executors.

In his written statement, filed in answer to the plaint, before the District Judge of *Cawnpore*, the Defendant pleaded that the Judge had no jurisdiction to entertain the suit, in respect it had not been regularly brought into Court, and to that plea he has adhered throughout all the subsequent stages of the litigation. The Defendant also pleaded that the Plaintiff had failed to comply with the provisions of sect. 34 of the *Indian Patent Act* XV. of 1859, inasmuch as no particulars of the breaches complained of had been delivered with the plaint; and that, in the absence of such particulars, he could not be called upon to state a defence to the action upon its merits.

The District Judge, by an order dated the 2nd of March, 1882 (the day appointed for adjustment of issues), overruled both pleas, and adjusted issues for the trial of the cause. The first and second issues raised these two pleas; but the Defendant, not being satisfied with the decision of the District Judge, on the 7th of March, 1882, presented an application to the High Court under sect. 622 of the Civil Procedure Code, with the

(1) 2 Moore's Ind. Ap. 349.

view of obtaining an alteration of the order of the 2nd of March, in so far as it related to these pleas. That petition was rejected, as irregular, by the High Court on the 20th of March, 1882; and the District Judge then proceeded with the trial of the issues adjusted by him. On the same day on which the Plaintiff's evidence was concluded, the Defendant presented a petition in which he reiterated his pleas, and for the first time stated certain particulars of objections to the validity of the Plaintiff's patents, which he desired to prove. The learned Judge held that the notice of particulars came too late, and negatived the Defendant's right to lead evidence in support of them; and thereafter he found, upon the Plaintiff's evidence, that the alleged infringement had been established, and assessed damages at Rs.10,000. That sum was fixed, on the footing that it was a fair consideration for the Defendant to pay for a license to use the Plaintiff's inventions; but in the argument upon these appeals, the Plaintiff's counsel admitted that the principle of assessment was erroneous, and that the damages due (if any) must be limited to the loss occasioned to the patentee by reason of the Defendant's infringement.

Upon an appeal by the Defendant, the High Court for the North-Western Provinces, consisting of Sir *Robert Stuart*, C.J., and *Tyrrell*, J., agreed with the Court below that the Defendant's plea of no jurisdiction was not well founded. They held, however, contrary to the finding of the District Judge, that there had been an entire failure on the part of the Plaintiff to observe the requirements of sect. 34 of the *Patent Act*, and consequently "that the Plaintiff came into Court without any case which could possibly be tried." Being of opinion, in these circumstances, that the Plaintiff ought to be allowed another hearing on the merits, the learned Judges directed "that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at *Cawnpore*, and that with the plaint the particulars required by sect. 34 be duly delivered." The costs were ordered to "be reckoned as costs in the cause."

Their Lordships are of opinion that it is impossible, in any view which can be taken of the Defendant's pleas, to sustain the operative decree of the High Court. It sets aside, or at least

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ignores, the whole previous proceedings, including the plaint in which the suit originated; and it directs a new and amended plaint to be presented to the Court, which is simply equivalent to directing a new suit to be instituted. Assuming that the Defendant's pleas were rightly disposed of by the High Court, what the Court ought to have done was to give the Plaintiff the alternative of having his suit dismissed, or of withdrawing it, with leave to bring a new action.

Their Lordships are of opinion that the Defendant's plea, founded on sect. 34 of the *Patent Act*, was rightly disposed of by the District Judge. It appears to them that the learned Judges of the High Court have misconstrued the enactments of that section which refer to the particulars of breaches to be delivered by a Plaintiff complaining of infringement. The sole object of these enactments is to give the Defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself, or in a separate paper. In so far as it relates to particulars of breaches, sect. 34 of the Indian Act is expressed in substantially the same terms with sect. 41 of the English *Patent Act* of 1852 (15 & 16 Vict. c. 83). In *Talbot* v. *La Roche* (1), which was an action for violation of a patent "for improvements in obtaining pictures or representations of objects," the Plaintiff merely alleged that, during a certain period of time and at a certain place, the Defendant had infringed, "by making, using, and selling pictures and portraits according to the Plaintiff's invention;" and that was held, by the Court of Common Pleas, to be sufficient compliance with sect. 41. Chief Justice *Jervis*, distinguishing between particulars of breaches, and particulars of objection, to be delivered by the Defendant, said in that case (2):—"Under a plea of want of novelty, the Court require the particulars to condescend upon the particular instances. But that is very different from this case, the matter there is not in the knowledge of the patentee. But the Defendant must know whether and in what respects he has been guilty of infringement." In *Needham* v. *Oxley* (3) the Plaintiff simply pointed to certain machines used by the Defendant, and stated in general terms

(1) 15 C. B. 310. (2) Page 321.
(3) 1 H. & M. 248.

that they infringed his patent. Lord *Hatherley* held that sufficient particulars had been delivered, and he accordingly refused the Defendant's motion for an order on the Plaintiff to specify in what respects his machines infringed the patent. There are other authorities to the same effect, but it is unnecessary to refer to them.

In the present case all three of the Plaintiff's patents relate to one article, a kiln for burning bricks, and the second and third in date are for improvements upon the invention specified in the first. The Plaintiff points to a particular kiln constructed and used by the Defendant, and in his plaint he not only refers to his patents, but indicates in the case of each of them the distinctive features of his invention which he alleges to have been appropriated by the Defendant in the construction and use of the kiln. It is therefore impossible to accept the views of the High Court upon this branch of the case without disregarding the authoritative construction which has been put upon the corresponding section of the English Act, a construction which appears to their Lordships to be just and reasonable.

There only remains for consideration the objection stated by the Defendant to the jurisdiction of the Court. The circumstances in which the plea was taken are these. The plaint was originally filed in the Court of the Subordinate Judge at *Cawnpore* on the 2nd of February, 1882, whereas sect. 22 of the Act XV. of 1859 provides that no action for infringement "shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue, or the Defendant shall reside as a fixed inhabitant." The principal Court of original jurisdiction was the Court of the District Judge. On the 15th of February, 1882, the Defendant personally signed, along with the Plaintiff and his pleader, a petition praying the District Judge to withdraw the case from the Court of the Subordinate Judge, and to try the suit in his own Court. On the same day an order was made in the District Court in these terms:—"That the case be transferred from the Subordinate Judge's Court to the file of the Court, and the date will be fixed hereafter." It is admitted that the District Judge had no

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authority to issue that order unless such authority was given him by Act X. of 1877, sect. 25. The suit was entered in the file of the District Court, and has since proceeded as a transferred suit, originally instituted in the Court of the Subordinate Judge.

In the argument addressed to their Lordships it has not been disputed, and it does not appear to admit of doubt, that a suit for infringement could not be completely instituted in the Court of the Subordinate Judge. Sect. 22 of the *Patent Act* expressly provides that no such suit shall be maintained before that Court; and the first and an essential step in the maintenance of a suit is its due institution. In the opinion of their Lordships, the transference of the suit to the District Court was equally incompetent. It was decided by the High Court of *Calcutta* on the 10th of June, 1880 (1), that the Superior Court cannot make an order of transfer of a case under sect. 25 of the Civil Procedure Code, unless the Court from which the transfer is sought to be made has jurisdiction to try it. Having regard to the terms of sect. 25, their Lordships entirely approve of that decision. Apart, therefore, from any question of estoppel affecting the Defendant, there was no competent suit depending at the Plaintiff's instance on the 6th of April, 1882, when the Defendant raised the plea of no jurisdiction in his written statement of defence.

But then it is said that the Defendant must be held, by reason of his conduct in the suit, to have waived all objection to the irregularities of its institution before his statement of defence was lodged. It is not said that the Defendant has done anything to waive that objection, since it was stated in his written answer to the plaint. On the contrary, he has taken every possible opportunity to insist in it. The result is, that the Defendant must now have the same judgment upon his plea of no jurisdiction which ought to have been given by the District Judge when the plea was first disposed of by him on the 2nd of March, 1882

The Defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to enter-

(1) *Peary Lall Mozoomdar* v. *Konal Kishore Dassia*, Ind. L. R. 6 Calc. 30.

tain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a Defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the Defendant's plea was stated before issue was joined on the merits, and, in reliance on that plea, he objected to the case being tried, and withheld his objections to the validity of the patent. It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the Defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause should be tried on its merits by the District Judge.

Great stress was laid by the Plaintiff's counsel upon the terms of a petition prepared by the Defendant's native pleader, which was filed before the District Judge on the 24th of February, 1882. It is a singular fact that this petition, now said to be so very important, is one of the documents which neither of the parties considered of sufficient importance to be forwarded along with the other papers in these appeals. But taking the account given of it by the District Judge, it must have been prepared by the Defendant's pleader, before the transference of the suit on the 15th of April, with the view of informing the Subordinate Judge that the Defendant was about to leave for *England*, in consequence of ill-health, and moving that Judge to have the cause heard and determined with the least possible delay. The petition

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states the plea of no jurisdiction in the Subordinate Judge, so that one of the points which the pleader, at the time when it was originally prepared, desired the Subordinate Judge to hear and determine at once was the plea against his own jurisdiction. Accordingly the Plaintiff's argument as to waiver really rests upon the single fact that the Defendant personally concurred with the Plaintiff and his pleader in petitioning the District Judge to transfer the suit, in terms of sect. 25 of the Procedure Code. The grounds of that petition had nothing to do with want of jurisdiction in the Lower Court, but were ordinary grounds of convenience, which would justify the removal of a suit to the Higher Court from the Lower, assuming it to have been properly instituted there. Their Lordships are unable to hold that such a consent to a transfer operates as a waiver of the Defendant's preliminary pleas or of any of his pleas. It is professedly and in substance nothing more than a consent that these pleas shall be disposed of by another than the Subordinate Judge. They are consequently of opinion that the District Judge, instead of repelling, ought to have sustained the Defendant's plea.

Their Lordships regret that, in accordance with the opinion which they have formed, the suit must be dismissed, on the ground that it was not competently brought; but they cannot dispense with the requirements of the Patent Act and Procedure Code, and the result is due to the Plaintiff himself, who has shewn no less obstinacy than the Defendant in perilling the issue of the case upon his own views of the law. Nothing would have been easier than for the Plaintiff to obviate the objections to the regularity of the procedure urged by the Defendant in his written statement. On the other hand, the Defendant might, with perfect propriety and without difficulty, have stated his particulars of objections to the Plaintiff's patent, notwithstanding the prejudicial pleas which he was maintaining. If the suit had been competently brought, their Lordships would certainly not have thought it right to indulge the Defendant with a new trial of the cause, and would have given judgment for the Plaintiff, with damages assessed upon a proper principle. As the case stands, they must humbly advise Her Majesty that the judgment of the High Court, except in so far as it recalls the decision of the

District Judge, must be reversed, and the suit dismissed, with costs in both Courts below. The executors of the Defendant, Mr. *Petman*, will have their costs in the original and cross appeals.

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Solicitors for Appellants. *Barrow & Rogers.*
Solicitors for Respondent: *Sanderson & Holland.*

THE COLLECTOR OF GODAVERY . . . DEFENDANT;

AND

ADDANKI RAMANNA PANTULU . . . PLAINTIFF.

J. C.*
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June 23; July 10.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Limitation—Act XV of 1877, sched. ii. art. 144—Adverse Possession—Presumption—Co-proprietor with Joint Family.

Where the husband of a female member of a Hindu joint family had been, on the purchase of an estate, admitted by the male members as a co-proprietor in respect of a one-fourth share thereof:—

Held, that possession of the whole estate by the joint family or its manager was adverse to such co-proprietor in respect of his fourth share unless shewn to have been authorized by him, and consequently that the Plaintiff, who claimed title from him, was barred by *Limitation Act* XV. of 1877, sched. ii. art. 144.

APPEAL from a decree of the High Court (Feb. 26, 1884) reversing a decree of the District Court of *Godavery* (Dec. 22, 1882), and deciding the Respondent's suit in his favour.

The facts are stated in the judgment of their Lordships.

On the 19th of July, 1880, this Respondent sued in the District Court of *Godavery*, for division and possession of one-fourth share of the mutta of *Kesanakurru*, with profits for the past three years. This plaint set out a title from *Krishnayya* to *Anandarayadu*, and from him to *Seshayya* who conveyed to the Plaintiff, as stated in the said judgment.

On the 25th of November, 1880, the Collector, as agent for the Court of Wards, presented his written statement, whereby, *inter*

* *Present:*—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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alia, he denied that *Anandarayadu* had ever had any possession or enjoyment, and asserted the invalidity of the transfer to him, and by him to *Seshayya*.

Mayne, and *Phillips*, for the Appellant, contended that possession had been adverse to the Plaintiff and those from whom he derived title for the whole statutory period. See Act XV. of 1877, sched. ii. art. 144.

Reference was made to *Sreemanchunder Day* v. *Gopalchunder Chuckerbutty* (1); *Nawab Azunt Ali Khan* v. *Hardwari Mull and Another* (2); *Faez Buksh Chowdhry* v. *Fahharoodden Mahomet Ahmun Chowdhry* (3).

Doyne, and *Johnstone*, for the Respondent, contended upon the evidence that the possession was not adverse.

Counsel for the Appellant were not called upon to reply.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a decision of the High Court of Judicature at *Madras*, by which a decree of the District Court of *Godavery* in favour of the present Appellant, the Defendant in the suit, was reversed.

The suit was commenced on the 24th of May, 1880. The Plaintiff, now Respondent, prayed that his right might be established to a fourth share in the mutta of *Kesanakurru*, in the district of *Godavery*, and that a fourth share might be divided and delivered over to him, with Rs.3000 on account of past profits for three years, at Rs.1000 a year for his one-fourth share.

The suit was brought against the Defendant, the Collector of the district of *Godavery*, as agent to the Court of Wards and guardian of *Ramalaksmamma*, a minor, who was the widow of *Sarvaraya* deceased. The Plaintiff claimed as a purchaser of the undivided fourth share. He alleged that one *Anandaraya*, who as the joint proprietor of the mutta had been entitled to a fourth

(1) 11 Moore's Ind. Ap. Ca. 28. (2) 13 Moore's Ind. Ap. Ca. 395.
(3) 14 Moore's Ind Ap Ca. 234.

share thereof, and had been in enjoyment of the same, on the 26th of May, 1868, by a registered sale deed sold his right, title, and interest therein for Rs.10,000 to *Seshayya*, who on the 8th of March, 1880, sold the same to him, the Plaintiff, for Rs.5000. It appears that the estate of which the Plaintiff claimed an undivided fourth share was originally purchased some time about the year 1848, before the birth of *Sarvaraya*, the deceased husband of *Lakshmamma*, by his father *Krishnayya*, in his own name; that at that time *Krishnayya* and his two brothers, *Pattabhiramaya* and *Adinarayya*, constituted a joint Hindu family governed by the Mitakshara law of inheritance. There was no direct evidence to shew what funds were employed in the purchase of the estate. The presumption, therefore, in the absence of evidence to the contrary, would be, that it was purchased with joint family funds, and that the estate so purchased became the joint estate of the family. However, on the 31st of March in the year 1853, after the birth of *Sarvaraya*, *Krishnayya* his father presented to the District Collector of *Godavery* an arzi accompanied by a will, dated the 29th of March, 1853, which he stated that he had executed to his younger brothers, &c.

The following is a copy of the will:—

"Will executed on the 29th March, 1853, by me *Balusu Buchchi Krishnayya*, proprietor of *Kusba Kapileswarapuram*, &c., in favour of my son *Buchchi Sarvarayadu* and the joint proprietors with me of *Kapileswarapuram*, *i.e.*, my two undivided brothers, *Pattabiramayyagaru* and *Adinarayanaryudugaru*.

"The illness I have been suffering from for the last two months having at present grown serious, I think that I cannot survive it any longer, and as, after my death, my son *Buchchi Sarvarayadu* and both of you are the joint proprietors of our joint proprietary estate of *Kusba Kapileswarapuram* possessing equal rights, you three should jointly enjoy the said estate, and you *Pattabiramayya* who are capable of managing business, should manage the whole business from this day, until my son, who is now a minor, should enter into a partition of the estate with you on attaining his proper age. Further, as all of us possess equal rights to *Kesanakurru* muttu estate which was purchased by means of our family funds and the funds of *Kolupati Anandara-*

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yadu, the husband of our sister, and which now stands registered in my name alone, you four persons, *i.e.*, my two undivided brothers, my son *Buchchi Sarvarayadu*, and *Kolupati Anandarayadu*, who is the husband of our sister, should jointly enjoy the produce of *Kesankurru* mutta."

This is the estate in dispute.

"You *Pattabhiramayya* should hold yourself also the management of the business of the said estate of *Kesanakurru* mutta from this day, and as your younger brother *Adinaryanarayadu*, my wife, and our brother-in-law *Kolupati Anandarayadu* have all agreed to your taking the responsibility of managing the said *Kesanakurru* mutta, you should protect the whole family holding the management of the *Kesanakuru* mutta yourself. If you should think of dividing the said two muttas among yourselves, *Kapileswarapuram* should be divided into three shares among my son *Buchchi Sarvarayadu* and you both who have been joint proprietors with me, and *Kesanakurru* mutta into four shares among you three and *Kolupati Anandarayudu*, and each should get registered in his name his share and enjoy each his share. Until then you, *Pattabhiramayya*, should conduct the whole management of the two estates yourself, and until my son *Buchchi Sarvarayadu* attains his proper age, you should protect him, his sister, and his wife, and celebrate the marriages, &c., of him and his sisters. Should it happen that you have to divide among yourselves each his share, before *Buchchi Sarvarayadu* attains his proper age, you yourself should, until he attains his proper age, retain his share of the estate under you and manage it yourself, and hand over to him his estate on his obtaining his proper age. Will executed of my full accord.

"(Signed) *Bucchi Krishnayya*."

It is unnecessary in the view which their Lordships take of the case to determine what was the effect of the arzi and will of *Krishnayya*, or to consider the effect of the documentary and other evidence adduced in support of *Anandaraya's* title; for assuming that he had a title to an undivided fourth share in the estate, his right and the rights of those who claim under him appear to their Lordships to have been barred by limitation.

It was proved by *Seshayya* that he married a grand-daughter of *Anandaraya*, that he made advances of money to him from time to time to the extent of Rs.6000, and that *Anandaraya* being unable to discharge his debt, sold his share in discharge of the debt and for an additional sum of Rs.4000 which were paid to him by *Seshayya*; and that on the 8th of March, 1880, *Seshayya* resold the share, together with past profits thereof to the Plaintiff for Rs.5000. It was proved by *Seshayya* and admitted that the Plaintiff never had possession of any part of the estate, and never received any portion of the profits thereof. In order to shew what little confidence *Seshayya* had in his title, it may be observed that in the bill of sale from him to the Plaintiff he stipulated that the Plaintiff should not recover from him any costs which he might incur on account of suits that he might bring for the recovery of proprietorship, and of the past profits, or the amount paid for the purchase in case his suit for recovery of the property should be dismissed.

The absence of possession is carried as far back as the 26th of May, 1868, the date of the sale to *Seshayya*, a period of twelve years, minus two days, prior to the 24th of May, 1880, the date of the commencement of the suit.

One of the issues raised in the suit was whether the Plaintiff, or those under whom he claims, ever had possession of the property in the suit, and whether the suit was barred by limitation. The only question to be considered is whether during the two days prior to the 26th of May, 1868, *Anandaraya* had an actual or constructive possession of a one-fourth share, or whether the possession of *Sarvaraya* was not adverse to him during that period.

Adinarayya, the younger brother of *Krishnaya*, died in 1857, and *Pattabhiramayya* the elder brother, who appears to have acted as manager in accordance with the will of *Krishnayya*, died in 1866 or 1867, and on his death *Sarvaraya*, who had no authority to act as manager of *Anandaraya's* fourth share, assuming him to have had one, entered into possession of the whole estate.

It does not appear upon any credible evidence that *Anandaraya* ever received any portion of the rents and profits of the estate, a fact which must have been capable of proof had it existed.

Their Lordships cannot believe the evidence of the Plaintiff's

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witnesses, of whom the fifth, viz., *Seshayya*, the first purchaser of *Anandaraya's* fourth share, went to the extent of stating that *Anandaraya* managed the estate, and the first of whom stated that although the lease to his master was in the name of *Pattabhirama*, the rent was paid to *Anandaraya*, and never to the other sharers. Their Lordships concur with the Subordinate Judge who heard the Plaintiff's witnesses and saw their demeanour, and who stated that he was not satisfied with them. The High Court does not express an opinion at variance with the finding of the Subordinate Judge that *Anandaraya* was never in possession or enjoyment of the one-fourth share. It is improbable that if *Seshayya* believed that *Anandaraya* was in the management of the estate or in the receipt of a fourth share of the rents and profits up to the time of his purchase, he having purchased that share for Rs.10,000, would have allowed *Sarvaraya* to retain the exclusive possession of the whole estate and of the rents and profits thereof for a period of nearly twelve years without any attempt to recover his share. He says as the estate had been in the management of the Court of Wards for twelve years he remained quiet, thinking he would have to incur much expense if he should institute a suit. Again he states that as the estate was made over to the Court of Wards he sold for Rs.5000 the share that he had bought for Rs.10,000, not being able to file a suit. The High Court says "The seller, *Anandaraya*, died at the end of 1868, and that the purchaser was deprived of the opportunity of examining him in what manner, if any, he had enjoyed the share recorded in his name." It must, however, be borne in mind that *Anandaraya* lived for eight or nine months, and *Sarvaraya* for upwards of twelve months after the sale to *Seshayya*, during which period the latter might have brought a suit against *Sarvaraya* and called *Anandaraya* as a witness to prove that he had received his share of the profits down to the time of the sale to *Seshayya*, if such had been the fact. The Subordinate Judge alludes to the delay on the part of *Seshayya*. He stated that he was confirmed in the view that *Anandaraya* was never in possession by the consideration that had he really been in possession his vendor would not have remained quiet for nearly twelve years. The High Court say

that until the 6th of August, 1868, *Sarvaraya* did not set up a title hostile to *Anandaraya*. But if *Anandaraya* never had possession of the one-fourth share from the time of *Krishnayya's* death in 1853, and *Sarvaraya* and his uncles, as a joint Hindu family, had the exclusive possession thereof without any claim on the part of *Anandaraya*, of which there is no proof, there seems to be no reason why *Sarvaraya* should set up any title hostile to *Anandaraya*. Their Lordships fail to see any reason why if no claim was made a hostile title should be set up. As soon, however, as *Anandaraya* presented his petition, on the 14th of July, 1868, more than fifteen years after the date of *Krishnayya's* will to have *Seshayya's* name registered as the proprietor of the one-fourth share in consequence of his purchase, *Sarvaraya* did, on the 6th of August following, object to such registration, disputed *Anandaraya's* title, and asserted that he had never shared in the profits of the estate. The Collector, in consequence of such objection, refused to register the one-fourth share in *Seshayya's* name. Yet even then *Seshayya* took no proceedings to enforce his claim, and allowed *Sarvaraya* to retain possession of the whole estate up to the time of his death, on the 23rd of July, 1869, shortly after which date the whole estate was taken under the care of the Court of Wards for the infant widow of *Sarvaraya*, and so remained until the commencement of the suit. The High Court say that *Pattabhiramaya* remained in possession up to his death in 1866, when possession was taken by his nephew *Sarvaraya* of his own three shares as the surviving member of the joint family, and of *Anandaraya's* undivided fourth share, presumably as heir to his uncle the deceased manager. This, however, is clearly an error. If, as represented by *Krishnayya* by his will of 1853, the estate was purchased by means of the family funds and the funds of *Anandaraya*, and *Anandaraya* was entitled to an undivided fourth share, *Anandaraya* was not entitled to such share as a member of the joint family, for, as the husband of a sister or daughter of *Krishnayya*, he would not become a member of the joint family, nor would his share be inheritable by the members of the joint family according to the Mitakshara. His share would be inheritable by his own heirs, and the other three fourths would pass to the surviving members of the joint family by survivorship. It

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was impossible, therefore, for *Sarvaraya* to succeed to *Anandaraya's* fourth share during *Anandaraya's* lifetime by inheritance from his uncle, the deceased manager. It appears to their Lordship that it must be presumed that at least from the time when *Sarvaraya* took possession after his uncle's death the possession was adverse to *Anandaraya*, and, consequently, that the suit was barred by limitation by art. 144, sched. ii., Act XV. of 1877. If *Sarvaraya* claimed to take the one-fourth share as heir to his uncle, the possession was clearly adverse to *Anandaraya* within the meaning of art. 144, and the suit would also be barred by limitation.

Upon the whole, their Lordships are of opinion that the decree of the Subordinate Judge was correct, and they will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the First Court be affirmed, and that the Respondent do pay the costs of the Appellant in the High Court.

The Respondent must also pay the costs of this appeal.

Solicitor for the Appellant: *H. Treasure.*

Solicitors for the Respondent: *T. Luæmore Wilson & Co.*

VENKATA NARASIMHA APPA ROW . . APPELLANT;

AND

THE COURT OF WARDS AND OTHERS . . RESPONDENTS.

J. C.*
1886
July 17.

VENKATA RAMALAKSHMI GARU AND OTHERS . . . . . APPELLANTS;

AND

GOPALA APPA ROW AND OTHERS . . . RESPONDENTS.

Ex parte RAJAH GOPALA APPA ROW.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Petition for Rehearing.

In a petition for rehearing of two appeals which had been fully heard upon their merits, and in which judgment had been given and reported to Her Majesty, and confirmed by regular orders in Council:—

Held, that assuming that a relevant case of new matter had been made out the decision was final, and the petition must be refused.

There may be exceptional circumstances which will warrant this Board, even after an order of Her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties; but this is an indulgence with a view mainly to doing justice when by some accident, without blame, the party has not been heard and an order has been made inadvertently as if the party had been heard.

Rajunder Narain Rae v. *Bajai Govind Sing* (1) referred to.

THIS was a petition of *Rajah Raji Gopala Appa Row* for an order that two appeals should be reheard, and that two orders of Her Majesty in Council dated the 15th of December, 1879, and the 3rd of May, 1882, should be varied, and the judgment of the High Court of *Madras* therein restored.

The judgment of the Judicial Committee in the earlier appeal was given on the 13th of December, 1879, and is reported in Law Rep. 7 Ind. Ap. 38.

The later judgment was in an action commenced shortly after

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 2 Moore's Ind Ap. Ca. 220; S. C. 1 Moore's P. C. 117.

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the former one by three brothers of the former Plaintiff, also against the eldest brother, claiming their shares in consequence of the partibility of the estate. It appearing that the evidence was the same as in the former case, the judgment and order followed accordingly.

The Petitioner alleged that having been an infant at the hearing of the appeal, which was decided on the 13th of December, 1879, he had since attained full age and had discovered that there were documents existing among the public records in *India* which show that the said zemindary was never escheated or declared forfeited, but was only held by the Government till certain taxes should have been reimbursed out of its revenues, and that previous to the sunnud of the 8th of December, 1802, being executed, the zemindary had been ordered to be restored to the family, and the arrears of taxes forgiven, and a release given to each of the said brothers, to whom parts of the zemindary were granted. The petitioner specified the documents from which he alleged that the foregoing appeared.

Bompas, Q.C. (*Nandalall Ghose* with him) for the petitioner, contended that it had been decided by the Privy Council that where a zemindary had been previously restored the granting of a sunnud in the terms of that granted in this case does not affect the rule of descent, or render the zemindary partible. The judgment in 7 Ind. Ap. not only affected the immediate rights of the parties, but must inevitably lead to the complete breaking up of the zemindary. The property was of great value, and the decision affected many people besides the parties. Reference was made to the Civil Procedure Code, 1882, sect. 623, which prescribed the course to be taken and the rights of the parties on the discovery of new and important matter or evidence after judgment, not discoverable by due diligence previously. By Act XV. of 1877, sect. 7, an infant is entitled as of right to make the application for review contemplated by the last quoted Act within three years after he comes of age, whatever the date of the decree. See *Kelsall* v. *Kelsall* (1); *Dabee Dutt Shahoo* v. *Subodra Bibee* (2). The Privy Council has the power to review its own judgments. See *Hebbert*

(1) 2 M. & K. 409. (2) 25 Suth. W. R. 449.

v. *Purchas* (1); and *The Singapore and The Hebe* (2); and the cases and statutes cited in the former case. Reference was also made to *Rajah Deadar Hossein* v. *Ranee Zuhoorunissa* (3); *The Shivagunga Case, Mutta Vaduganadha Tevar* v. *Dora Singa Tevar* (4); *Meer Mahommed Hossein* v. *Forbes* (5); *Muttusawmy Yettappa* v. *Vencataswara* (6); *Juveer Bhaee* v. *Vuruj Bhaee* (7).

The judgment of their Lordships was delivered by

LORD WATSON:—

Their Lordships are of opinion that this petition must be refused.

The Petitioner asks a rehearing of the judgment of this Board in these two appeals, which was finally approved by Her Majesty in Council in the year 1883. The ground upon which he makes the application is, that he has discovered certain new matter which would, if it had been produced in these appeals, have materially affected the judgment of the Board. After hearing a very full explanation from counsel at the Bar, it appears to their Lordships to be exceedingly doubtful whether the documentary evidence, which is said to be new, could have had any bearing or any effect upon the decision of the Board. But it is hardly necessary to consider that point, because some of the documents which are alleged to be new are printed at length in the record formerly before this Board; and that which is now represented by the petitioner to be the most important of them all is a recommendation of the Special Commissioner, approved of by the Governor in Council on the 3rd of December, 1802. That document is fully and correctly described in the record, so that its existence was known to the parties. In short it is certain that most of the documents were well known to the parties, and were actually produced, and that, with reasonable care and diligence, all of them might have been recovered and made evidence, by the ordinary methods of procedure.

(1) Law Rep 3 P. C. 664.
(2) Law Rep. 1 P. C. 378.
(3) Macph. P. C. 165.
(4) Law Rep. 6 Ind. Ap. 99.
(5) Law Rep. 2 Ind. Ap. 1.
(6) 12 Moore's Ind. App. Ca 203.
(7) 3 Moore's Ind. App. Ca. 324.

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Their Lordships are unwilling to dispose of this application on these grounds alone. They are willing to assume, for the purposes of this petition, that a relevant case of *res noviter* is set forth in it,—new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at. But in considering the Petitioner's motion for a rehearing, the following facts must be kept in view. It is not alleged that there was any informality in the conduct of these suits from their inception to their close. Both parties appeared before the Committee; they were fully heard upon the merits of the appeals, the Petitioner being at that time represented by the Court of Wards. It is not said that there was any error in framing the judgment of this Board, or that it did not fully and accurately express what the Board intended to decide. Then it was reported to Her Majesty, and was confirmed by regular Orders in Council dated the 3rd of May, 1882, and the 19th of July, 1883. No authority has been cited to their Lordships which can warrant them in granting a rehearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases in which that may be competently done are explained by Lord *Brougham* in the case of *Rajunder Narain Rae* v. *Bijai Govind Sing* (1). His Lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At page 134 of the first volume of *Moore's* Reports, his Lordship says: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard." Even before report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of

(1) 2 Moore's Ind. Ap Ca. 181; S. C. 1 Moo. P. C. 117.

Hebbert v. *Purchas* (1), where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said:—"Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused." There is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublicæ ut sit finis litium.* Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

Solicitors for Petitioner: *Scott & Spalding.*

(1) 7 Moo. P. C. 468.

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June 24, 25, 26, 30; July 1, 2, 21.

IMAMBANDI BEGUM . . . . . PLAINTIFF;

AND

KUMLESWARI PERSHAD AND OTHERS . DEFENDANTS.

AND CROSS APPEAL.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Benami Transactions—Relinquishment by Durmokurruridar—Limitation—Act XV. of 1877, Sched. II., Art. 144.

Where there are benami transactions, and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important.

In a suit against a purchaser at a sale under Act XI. of 1859, sect. 13, the Plaintiff claimed to have an incumbrance by virtue of two mokurruri pottahs executed by the heirs of the last of a series of benamedars, and it appearing that the last benamedar had actual ownership of one-fourth of the property comprised therein:—

Held, that the incumbrance was good to the extent of such fourth, and that the claim was not barred by art. 144 of Act XV. of 1877, Sched. II.

Where a durmokururri has been granted and then relinquished for valuable consideration to the grantors, no formal reconveyance is necessary to revest the title in the latter.

APPEAL from a decree of the High Court (Feb. 15, 1881), varying a decree of the Subordinate Judge of *Bhagalpore*, passed after remand on the 22nd of November, 1880.

The facts are stated in the judgment of their Lordships.

Mayne, and *C. W. Arathoon*, for the Appellants.

Cowie, Q.C., and *Doyne*, for the Respondents.

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July 21.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

On the 14th of June, 1875, *Ram Pershad*, the father of the Respondent in the original appeal and Appellant in the cross appeal, purchased at a sale for arrears of Government revenue a

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

share of the mehal *Bisthazari*, pergunnah *Bisthazari*, for Rs.64,600, and received a certificate of sale thereof from the Collector of *Monghyr*. The sale was made under the provision in sect. 13 of Act XI. of 1859, the 54th section of which enacts that when a share or shares of an estate may be sold under the provisions of sect. 13 or sect. 14, the purchaser shall acquire the share or shares subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners. On the 25th of February, 1878, the Appellant in the original appeal, *Imambandi Begum*, brought a suit against *Ram Pershad Das* and others, claiming to have an incumbrance upon the estate by virtue of two mokurruri pottahs, one executed by *Mirza Tasadduck Hossein Khan, alias Jhoti Khan*, on the 1st of March, 1866, and the other by *Mirza Mahomed Taki Khan, alias Bari Khan*, on the 6th of April, 1866. They were the brothers and heirs of *Mussumat Fatima Begum, alias Nawab Bohu Begum*, and they thereby leased in perpetuity to *Imambandi Begum*, in the names of her servants *Syed Jaffer Ali* and *Mussummat Nazirunnissa*, the mouzahs specified in the first paragraph of the plaint (being part of the estate purchased by *Ram Pershad Das*) at an annual jumma of Rs.5801 7*a*. 6*p*. The main question in the suit and in the appeal is what was the right of *Bohu Begum* in the estate which was thus leased. The question in the cross appeal is whether the suit is barred by the law of limitation.

The property in dispute originally belonged to one *Abdur Rahman*, and it was along with the share of his brother, *Mokim Khan*, brought to sale in execution of a decree against them on the 1st of December, 1851. It was purchased by their servant *Najaf Ali*, and it was proved and has been found by both the Lower Courts that his purchase was benami for *Abdur Rahman* and *Mokim Khan*. *Najaf Ali's* name appears to have been entered in the Collector's books as the proprietor, and to have remained there till the sale in 1875 to *Ram Pershad Das*. On the 26th of December, 1851, *Najaf Ali* executed two ikrarnamas, one to *Sheik Ahmed Buksh*, and one to *Bohu Begum*, who was the wife of *Abdur Rahman*. In these the sale by auction on the 1st of December is mentioned, and it is stated that out of 16 annas of the purchased property he purchased 9 annas 1 dam for one *Sheikh Ahmed Buksh*, and

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6 annas 19 dams for *Bohu Begum*, and that they having failed to procure the earnest money and the consideration money he had obtained it from Mr. *Peter Omraet*, and had made a conditional sale of parts of the purchased property to Mr. *Omraet* for Rs.19,190, and certain leases for nine years of other parts to *Omraet* and to other persons on zurpeshgi. Then follow these words, "that when the whole and entire Rs.19,190, the consideration money, with interest, will be paid off from the proceeds of the villages, or in cash, by *Sheikh Ahmed Buksh* and *Mussummat Nawab Bohu Begum* aforesaid, to Mr. *Peter Omraet*, purchaser, then I will execute deeds of sale according to their request, for the same consideration money, and that is the auction sale price of the entire property purchased by me, that is, in respect of 9 annas 1 dam to *Sheikh Ahmed Buksh*, and 6 annas 19 dams to *Mussummat Nawab Bohu Begum* aforesaid." The statement that the purchase was made for *Ahmed Buksh* and *Bohu Begum* was untrue, and the evidence proved that the loan by Mr. *Omraet* was negotiated for by *Abdur Rahman* and *Mokim* the real purchasers. The intention of the ikrarnamas appears to their Lordships to have been that when the mortgage was paid off *Ahmed Buksh* and *Bohu Begum* should be respectively benamidar for each of the brothers in the place of *Najaf Ali*. If any cash was paid in satisfaction of the mortgage it would be paid in their names to give colour to the transaction.

Abdur Rahman died some time between 1854 and 1856. The precise date does not appear. He left as his heirs his brother *Mokim*, who was entitled to three fourths of his property, and his wife *Bohu Begum*, who was entitled to one fourth. The date of *Mokim's* death also does not appear, but it was before January, 1861, and he left as his heir his son *Isa Khan*, who thus became entitled to the three fourths of *Abdur Rahman's* property.

On the 8th of January, 1861, *Najaf Ali* executed a deed of sale. It begins with the same false statement as to his purchase as is in the ikrarnamas. It then refers to the conditional sale to *Omraet* and the two ikrarnamas, and after stating that owing to drought and for payment of Government revenue, *Najaf Ali* had obtained other loans, and decrees had been obtained against him, it proceeds thus:—"Now *Mussummat Nawab Bahu Begum*, widow

of *Khaja Mahomed Abdur Rahman*, deceased, has paid me wholly and in full on account of the purchase-money of the conditional deed of sale, and the amount of decree due to the aforesaid gentleman, in proportion to her own share which has been found due by calculation, and taken the zurpeshgi due to ticcadars for the aforesaid mouzahs, and the amounts of debts due to Mahajuns on account of her own share, upon herself to pay, and asked me to execute and give a deed of sale in due form." Then *Najaf Ali* sells and transfers to *Bohu Begum* the share which was purchased by *Abdur Rahman*, stating it to be in conformity with the ikrarnamah.

There was no evidence of any payment to him by *Bohu Begum*, and the statement as to that is probably as fictitious as the statement of his purchase having been made for her. The mortgage being a usufructuary one had most probably been paid off from the proceeds of the estate included in it and in the zurpeshghi leases, the expiry of which coincides closely with the alleged payment. The Subordinate Judge thought, from the statement in the deed and the want of proof of payment by *Abdur Rahman* or out of his estate, that the money was paid by *Bohu Begum*, and that owing to that payment she had acquired an exclusive right to the share, but the Judges of the High Court were of opinion that there was a mere transfer of names, and the real ownership in the property after *Abdur Rahman's* death remained in his legal heirs. This is the conclusion to which their Lordships have come.

It is very difficult to understand what was the real character of the transactions which followed upon the deed of sale. On the 23rd of January, 1861, *Bohu Begum* executed a pottah, by which, after stating that the estate was especially owned and possessed by her, she leased it in perpetuity at an annual rental of Rs.6000, on payment of Rs.7000 as nuzurana money to one *Mussiti Khanum*. Three days afterwards she executed another deed, by which she conveyed her proprietary right to one *Hosseini Khanum*. These persons, who were described in the instruments as inhabitants of *Patna*, were slave girls of *Bohu Begum* living with her in *Patna*, where she resided. Sometime in 1862 *Bolakun*, the widow of *Ahmed Buksh*, in whose favour *Najaf Ali*

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had executed a deed of sale of *Mokim's* share in accordance with the ikrarnamah of 1851, and who is shewn to be *Isa Khan's* benamidar, brought a suit against *Hosseini* and *Bohu Begum* to enforce her right of pre-emption based upon the alleged transfer of the disputed share by *Bohu Begum* to *Hosseini*. On the 21st of April, 1863, this suit was decreed by the First Court, but on appeal by the Defendants that decree was reversed by the High Court on the 8th of March, 1864. It has been seen that before this suit was brought *Isa Khan* had become entitled by inheritance to the share of *Mokim* and three fourths of *Abdur Rahman's*. He did not, however, intervene in this suit, and it may, their Lordships think, be fairly surmised that the sale which was impeached was only a pretended one, and the suit was practically brought by *Isa Khan* in order to strengthen the benami titles of *Bolakun* and *Bohu Begum*, and thereby defeat the creditors of *Mokim* and *Abdur Rahman*. It was said in this appeal that it was an admission by *Isa Khan* that *Bohu Begum* was the real owner. It may be so, but it is not conclusive, and must be looked at with the other evidence.

In May, 1856 or 1857 (two documents in the record giving different years), *Imambandi Begum* had obtained a decree against *Bohu Begum* for a large sum of money. In execution of that decree an order for the attachment of the disputed property was made on the 18th of May, 1861, but the actual attachment was not made till the 27th of January, 1864. It was probably the apprehension when the property had been transferred into the name of *Bohu Begum* of this decree being executed that led to the transfers to *Mussiti* and *Hosseini*. That proceeding was temporarily successful, for on their intervention the property attached was released on the 6th of December, 1864. *Bohu Begum* had died in October, 1864, and on the 29th of November, 1865, *Imambandi* brought a suit against her brothers and heirs and *Mussiti* and *Hosseini* to have the order of the 6th of December, 1864, set aside, and for a declaration that the property was liable to be sold in execution of her decree. In this she was successful, and, having made a fresh application for execution, some of the mouzahs attached in 1864 were sold and realized about Rs 34,000. At this auction sale *Isa Khan* was one of the purchasers, which

was greatly relied upon as an admission of *Bohu Begum's* title. It is such an admission, but it is not sufficient to prevail against the evidence that *Bohu Begum* was only a benamidar. *Imambandi* did not in these proceedings disclose the existence of the mokurruri pottahs, which are the foundation of her present suit.

Where there are benami transactions and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important. In this suit it is also the material fact with reference to the law of limitation. On the 16th of December, 1862, *Rajah Mohender Narain*, an influential zemindar of the district, obtained a ticca pottah from *Mussiti Khanum* of five annas twelve dams of the property in suit in the name of one *Gujadhur* and a durmokurruri pottah of the remaining one anna of *Abdur Rahman's* share. On the same date, or shortly afterwards, *Hosseini* transferred to the Rajah her proprietary interest in the one anna. From that time till the surrender, which will be afterwards noticed, *Rajah Mohender*, and after his death his son *Rajah Ram Narain*, was in the actual possession of the property, and the question is, who received the rent of the 5 annas 12 dams which he held as lessee. The Subordinate Judge found that *Bohu Begum* held possession under the bill of sale until her death. He appears to have done this upon both the oral and documentary evidence. One of the Judges of the High Court was clearly of opinion that till the death of *Bohu Begum* the Rajah held the disputed property as her tenant; the view of the other was that the Rajahs held as tenants of *Bohu Begum* for the owners, viz., *Abdur Rahman's* heirs. With regard to the possession after her death, the Subordinate Judge came to the conclusion that her brothers, whom he calls the two Khans, did not hold possession of the shares in suit, either directly or by collecting the rent from the ticcadar, and that they granted the mokurruri to *Imambandi* while they were out of possession. In his judgment on the first hearing he discusses the evidence and states his reasons for this very fully, and refers to that judgment in his judgment at the hearing on the remand. The Judges of the High Court came to the same conclusion as to the possession of the Khans, but they thought that until the Rajah refused to pay the rent to them they were in constructive possession of the property through him.

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Both Judges found that there was no payment of rent to *Isa Khan* till after April, 1866, and consequently no adverse possession, and held that the suit was not barred by the law of limitation. The law applicable is art. 144 in the 2nd Schedule of Act XV. of 1877, which makes the period of limitation (twelve years) run from the time when the possession of the Defendant becomes adverse to the Plaintiff. The Subordinate Judge thought that *Isa Khan* got into possession by receipt of the rent from the Rajah through *Mussiti*, but he was unable to fix the time when he did so, and their Lordships see no reason for doubting the correctness of Mr. Justice *Mitter's* opinion that *Isa Khan* did not assume adverse possession through *Mussiti* till the end of 1869.

The other Judge, Mr. Justice *Maclean*, was of opinion that, in the absence of clear proof of payment by the Rajah to *Isa Khan*, *Bohu Begum* and after her her brothers were in possession as late as April, 1866. The Judges therefore held that the suit was not barred by the law of limitation. This decision is supported by the evidence of *Rajah Ram Narain*, who said that the Government revenue used to be paid out of the collection of the mouzahs, and very little was left after the payment of that, and he did not recollect whether he paid it to any one or not. It does not appear to their Lordships that there is any satisfactory evidence of the receipt of rent by *Isa Khan* twelve years before the suit was instituted, and the finding of the Subordinate Judge that there was appears to be based upon a supposition arising from *Isa Khan* having won over *Mussiti*, the benami lessor, to his side, and not upon evidence of a receipt of rent directly from the Rajah. Therefore, upon the main questions in the appeals, their Lordships have come to the conclusion that *Bohu Begum* was the real owner of the one fourth only, which she took by inheritance from *Abdur Rahman*, and that her suit as to that is not barred.

The High Court has made a decree in her favour as to the one fourth, but with two qualifications, which it appears to their Lordships ought not to have been made. The first is in regard to the one anna, the subject of the durmokurruri to the *Rajah Mohender*. As to this the evidence of *Rajah Ram Narain* was that in 1874, having been dispossessed and being ready to bring a suit, the servants of the heirs of *Bohu Begum* and *Imambandi Begum* came to him, and having taken Rs.7000, he made a

settlement of the ticca and durmokurruri and relinquished them to the heirs of *Bohu Begum* and *Imambandi Begum*. Ikrarnamahs were executed, but through some neglect they were not registered within the time required by law to give them validity. The High Court, on the ground that there was no valid reconveyance of the one anna share either to the Plaintiff *Imambandi* or her lessors, deducted it from the one-fourth share. This, in their Lordships' opinion, ought not to have been done. A formal reconveyance of the one anna share was not necessary. The receipt of the Rs.7000 and relinquishment of possession by the Rajah to *Imambandi* or her lessors was sufficient to make it subject to the lease and to give a title against *Ram Pershad Das*.

The second qualification is that, although entitled to recover only a one-fourth share, she was held bound to pay the whole of the rent reserved by the mokurruri pottahs, and the decree in her favour is expressly made subject to that condition. The question whether the rent should be apportioned or not does not appear to have been raised, and ought not to be decided in this suit. That condition should be omitted from the decree, leaving the liability for rent to be determined hereafter if it should become necessary. Their Lordships will therefore humbly advise Her Majesty to vary the decree of the High Court in manner following, that is to say, that where the Plaintiff is decreed to recover a thirteen gundahs share out of the mouzahs mentioned therein she shall be decreed to recover a share of 1 anna 13 gundahs, and where she is decreed to recover a share of 11 gundahs out of the mouzahs mentioned she shall be decreed to recover a share of 1 anna 11 gundahs, and that the part of the decree whereby she is ordered and decreed to pay the whole of the mokurruri rent to *Ram Pershad Das* shall be omitted, and that in other respects the decree shall be affirmed. Their Lordships think that the parties should bear their own costs of these appeals and the application to file the cross appeal, and they therefore make no order as to them.

Solicitors for Appellant: *Oehme & Summerhays.*

Solicitor for the Respondent *Kumleswari Pershad*: *T. L. Wilson.*

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ACCRETION OF CHUR] Where a kabulyat stipulated that on the accretion to a certain howla of any new cultivable chur, a fresh measurement should be made of the chur and howla and that excess rent should be paid for the excess land at a stipulated rate up to five drones, and at pergunnah rates for the residue in default thereof rent to be realized according to law, or service made on the tenants of a notice "requiring them to take a settlement of the excess land and to file a kabulyat, and fixing the time at fifteen days," otherwise the excess land to be settled with others,—the kabulyatdar measured the howla and accreted chur without notice to the tenants and in their absence, then served on the tenants a notice thereof, and of the increased rent demanded, requiring them to appear within fifteen days and file a kabulyat for the said amount of land and rent, or that he would take khas possession —In a suit, amongst other things, for assessment of rent of the excess land —*Held* (1) that sect 14 of Act VIII of 1869 (B C) did not apply —(2) That the tenants were not bound by the measurement made by the kabulyatdar in their absence —(3) That the kabulyatdar was entitled to a decree fixing the extent of the excess land and assessing the rent payable for it and thereafter entitled to issue a fresh notice to the tenants to come a settlement in respect thereof, or give up possession RAMCOOMAI GHOSI *v* KALI KRISHNA TAGORE - - 116

ACT VIII OF 1869, (B C), s 14 *See* ACCRETION OF CHUR

ACT IX OF 1871, Sched II, Art 129 *See* LIMITATION

ACT XV OF 1859, s 34] The sole object of Indian Act XV of 1859, s 34, corresponding with sect. 41 of the English Patent Law Amendment Act, 1852, is to give the Defendant fair notice of the case which he has to meet, and it is quite immaterial whether the requisite information be given in the plaint itself or in a separate paper —Particulars of breaches must be distinguished from particulars of objection for want of novelty In the latter case the particular instances may not be within the knowledge of the patentee and must be specified in the former the Defendant must know whether and in what respect he has been guilty of infringement —Where three patents of the Plaintiff all related to one article, a kiln for burning bricks, and the second and third in date were for improvements upon the invention specified in the first, and the Plaintiff alleged a particular kiln constructed and used by the Defendant, and in his plaint not only referred

ACT XV OF 1859, s 34—*continued*

to his patents but indicated in the case of each of them the infringements which he complained of —*Held*, overruling the High Court that this was a sufficient compliance with the Act —*Talbot* v *La Roche* (15 C B 310), and *Needham* v *Oxley* (1 H & M 248) approved —Where the Court of Appeal sets aside the whole of the previous proceedings in a suit, it cannot direct a new and amended plaint to be filed, but must give the Plaintiff the alternative of having his suit dismissed or of withdrawing it, with leave to bring a new action —*Held* that under sect 25 of the Civil Procedure Code the superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it —*Peary Lall Mozoomdar* v *Komul Kishore Dassia* (Ind L R 6 Cal 30) approved —A suit having been instituted in the Court of the Subordinate Judge, who was incompetent to try it the same was transferred by consent of parties to the Court of the District Judge for convenience of trial *held*, that such transference was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the Defendant's written statement and subsequently insisted upon FEDGARD *v* BULL - - 134

ACT XV OF 1877 Sched II Art 144 *See* BENAMI TRANSACTIONS
LIMITATION

ACT XXIII OF 1861 s 11 *See* MORTGAGOR AND MORTGAGEE.

ACT XXXV OF 1858, s 9] Under sect 9 of Act XXXV of 1858 (which applies to *Oudh*, the Court of Wards is authorized to take charge of the property of an adjudged lunatic as therein directed without any order of Court in that behalf —Where the Court made an order appointing as manager of the lunatic's property the same person who acts as manager under the Court of Wards, *held*, that a lease for more than five years granted through such manager was valid as being within the powers of the Court of Wards, though under sect 14 of the Act it was *ultra vires* of a manager appointed by the Court RAE SARABJIT SINGH *v* CHAPMAN - - - - - 44

ADVERSE POSSESSION *See* LIMITATION

AGGRAVATION OF SERVITUDE *See* RIGHT OF WAY

AGREEMENT OF JOINT OWNERS NOT TO ALIENATE *See* MITAKSHARA LAW

ASSESSMENT OF RENT *See* ACCRETION OF CHUR

BENAMI TRANSACTIONS.] Where there are benami transactions, and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important.—In a suit against a purchaser at a sale under Act XI. of 1859, s. ct. 13, the Plaintiff claimed to have an incumbrance by virtue of two mokurruri pottahs executed by the heirs of the last of a series of benamieedars, and it appearing that the last benamieedar had actual ownership of one-fourth of the property comprised therein:—*Held*, that the incumbrance was good to the extent of such fourth, and that the claim was not barred by art. 144 of Act XV. of 1877, Sched. II.—Where a durmokurruri has been granted and then relinquished for valuable consideration to the grantors, no formal reconveyance is necessary to revest the title in the latter. IMAMBANDI BEGUM *v.* KUMLESWARI PERSHAD - - - 160

BENAMI PURCHASE.] Case in which it was held on the evidence, in a suit brought in 1879, that a purchase by a Hindu wife of a share of her husband's ancestral estate in 1842 was benami for her husband. DHARANI KANT LAHIRI CHOWDHRY *v.* KRISTO KUMARI CHOWDHRANI - - 70

BREACH OF USER: *See* RIGHT OF WAY.

BREACH OF WARRANTY.] In an action for damages for breach of warranties in contracts for the sale of good cutch, it appeared that the Respondents accepted the same after a searching examination thereof in *Calcutta*, but afterwards complained of the same when received in *New York* being not according to contract:—*Held*, that the onus was upon the Respondents by very cogent evidence to rebut the inference that the cutch accepted in *Calcutta* was according to contract, and that in the absence of any evidence as to its treatment in *Calcutta*, or of its loading, or of the conditions of the voyage, the action must be dismissed. GAN KIM SWEE *v.* RALLI AND OTHERS - - - - - - 60

CIVIL PROCEDURE CODE, 1877, s. 246.] *Held*, that, according to the true construction of sect. 246 of Act X. of 1877, a purchaser under a sale in execution is not bound to inquire whether the judgment debtor had a cross judgment of a higher amount such as would have rendered the order for execution incorrect. If the Court has jurisdiction, such purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which execution issues. REWA MAHTON *v.* RAM KISHEN SING - - - - 106

—— ss. 25, 562, 564: *See* ACT XV. OF 1859.

—— s. 558.
See PRACTICE. 3.

INAMS: *See* MADRAS REGULATION XXV. OF 1802.

JOINT FAMILY DEBT: *See* MITAKSHARA AND MITHILA LAW.

LIMITATION.] A suit "to set aside an adoption" denotes any suit which brings the validity of an adoption under question, and therefore includes a suit for possession dependent on that issue as well as a suit to declare its invalidity:—*Held*, therefore, that art. 129 of Act IX of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession.—Where the Defendants had been in fact adopted by Hindu widows purporting to act in pursuance of their husband's authority, and such adoptions had been followed by continuous possession, and had been recognized in formal instruments, proceedings, and decrees to which the Plaintiffs were parties:—*Held*, that suits by reversionary heirs of the husband brought more than twelve years after the adoptions, but less than that period after their title had accrued at the death of the surviving widow, were barred by art. 129 of Act IX. of 1871.—*Raj Bahadoor Singh* v. *Achumbit Lal* (Law Rep. 6 Ind. Ap. 110) explained. JAGADAMBA CHOWDHRANI *v.* DAKHINA MOHUN - 84

2. —— Where the husband of a female member of a Hindu joint family had been, on the purchase of an estate, admitted by the male members as a co-proprietor in respect of a one-fourth share thereof:—*Held*, that possession of the whole estate by the joint family or its managof was adverse to such co-proprietor in respect er his fourth share unless shewn to have been authorized by him, and consequently that the Plaintiff, who claimed title from him, was barred by *Limitation Act*, XV. of 1877, sched. ii. art. 144. COLLECTOR OF GODAVERY *v.* ADDANKI RAMANNA PANTULA - - - - - - 147

MADRAS REGULATION XXV. OF 1802, s. 3.] *Madras* Regulation XXV. of 1802, sect. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zemindar has no power to disturb grants otherwise valid made by his predecessor, or titles to inams acquired by prescription.—Where inamdars had received a grant in perpetuity of certain lands in 1811, and in 1863 had received a regrant thereof from the Appellant's predecessor on terms less favourable to themselves, *held*, that the Appellant had no power after the death of the last mentioned grantor to determine their tenancies by notices to quit. MAHARAJAH MIRZA SRI ANANDA *v.* PIDAPARTI SUBBANARAYANA SASTRI - - 32

MITAKSHARA AND MITHILA LAW.] In an execution sale it appeared that the debt was a joint family debt incurred by *G.*, the head of a joint Mithila family, and that the property sold was the share of the whole family in a certain mouzah:—*Held*, that *Demdyal's Case* (Law Rep. 4 Ind. Ap. 247) did not bind the Court to hold that nothing but *G.'s* coparcenary interest passed to the purchasers.—What passes by such a sale depends upon the nature of the debt (*e.g.*, whether or not it is tainted with immorality) and the intention of the parties. The other coparceners not being parties to the sale or the execution proceedings, are entitled to try the fact or the nature of the debt in a suit of their own. The purchaser, if he has bought the entirety, may defend his title on any ground which would have justified the sale. MUSSAMUT NANOMI BABUASIN *v.* MODUN MOHUN - - - - - 1

MITAKSHARA LAW.] Where two Hindu Mitakshara brothers entered into an agreement that "in case of failure of 'aurasa' (self-begotten) male issue" of one, their joint immovable property should go to the other, and should not be alienated by making adoption and the like; and it appeared that one of them had a son living at the date of the agreement;—*Held*, that, whether or not this agreement bound the brothers, it could not bind the son or prevent that son's adoption from conferring title by inheritance. SRI RAJA RAO VENKATA MAHAPATI SURYA RAO BAHADUR *v.* SRI RAJA RAO VENKATA MAHAPATI GANGADHARA RAMA RAO BAHADUR - - - 97

MORTGAGOR AND MORTGAGEE.] Where in 1877 a mortgagor sued to redeem lands which had been included in a mortgage executed in 1806, but based his claim on a decree obtained by the mortgagees in 1825, under which an account had been taken of what was due under the mortgage, no date being fixed for redemption:—*Held*, that redemption could only under Act XXIII. of 1861, s. 11, be effected under the said decree, and was barred, and that a fresh suit for the same purpose could not be brought. The Plaintiff could not fall back, contrary to his plaint, on the mortgage of 1806; nor could he contend that limitation ran from the acknowledgement thereof, no issue to that effect having been raised. HARI RAVJI CHIPLUNKAR *v.* SHAPURJI HORMUSJI - 66

ONUS PROBANDI: *See* BREACH OF WARRANTY.

ORDER OF TRANSFER: *See* ACT XV. OF 1859.

PETITION FOR RE-HEARING: *See* PRACTICE 4.

POWER OF APPELLATE COURT TO REMAND: *See* ACT XV. OF 1859, SECT. 34.

PRACTICE.] Case in which evidence is discussed and its true effect pointed out, and in which it is *held*, reversing a decree of the High Court, that an ikrarnamah relied upon by the Respondents was fabricated. It was connected with other documents already found to be forgeries, its contents did not dispel suspicion, it was not established by credible witnesses, nor supported by evidence of possession under it. No order made as to costs, fabricated documents having also been put forward on behalf of the Appellant. COOMARI RODESHWAR *v.* MANSOOR KOER - 20

2. —— In a suit for an account of sales of timber by the Defendant on behalf of the Plaintiff, *held*, on the evidence that the Plaintiff had failed to prove the contracts upon which she sued.—*Quære*, whether a set-off could be pleaded against such a claim, but no issue having been raised or applied for in regard to it, the cross appeal was dismissed. NAN KARAY PHAW *v.* KO HTAW AH - - - - - - 48

3. —— An appeal to the High Court having been struck off because security had not been filed, the Appellant, after obtaining leave, tendered security and prayed for the restoration of the appeal, but the High Court held that a petition to that effect was not entertainable under sect. 558 of the Code of 1877, since the order of dismissal had been made under sect. 549 and not under sects. 556 or 557:—*Held*, that on security being given the appeal should be restored. KUAR BALWANT SINGH *v.* KUAR DOULUT SINGH - 57

4. —— In a petition for rehearing of two appeals which had been fully heard upon their merits, and in which judgment had been given and reported to Her Majesty, and confirmed by regular orders in Council:—*Held*, that assuming that a relevant case of new matter had been made out the decision was final, and the petition must be refused.—There may be exceptional circumstances which will warrant this Board, even after an order of Her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties; but this is an indulgence with a view mainly to doing justice when by some accident, without blame, the party has not been heard and an order has been made inadvertently as if the party had been heard.—*Rajunder Narain Rae* v. *Bajai Govind Sing* (2 Moore's Ind Ap. Ca. 220, S. C. 1 Moore's P. C. 117) referred to. VENKATA NARASIMHA APPA ROU *v.* COURT OF WARDS - - - - - 155

PRINCIPAL AND AGENT.] Where a plaint alleged a continued agency in the Defendant and prayed for relief on the ground that there was a specific balance against him, and prayed for the recovery of such sum or any larger sum that might be proved to be payable:—*Held*, that such suit was essentially one for an account; that limitation under Act IX. of 1871 runs from the date on which the agency ceased; that the Court following the general rule ought not to make a final decree at the hearing, but should order an account to be taken of such agent's dealings with the Plaintiff's money.—Where a Defendant instead of submitting to an account falsely denies his receipts, his fiduciary position, and his accountability *in toto*, *held* that he should be directed to pay the whole costs of the suit, independently of the result of the account. HURRONATH ROY BAHADOOR *v.* KRISHNA COOMAR BUKSHI - 123

REASONABLE USER OF A PASSAGE: *See* RIGHT OF WAY.

REGULATION XVII. OF 1806.] In those parts of *India* where *Bengal* Regulation XVII. of 1806 is in force the right to redeem a mortgage by conditional sale is governed entirely by the Regulation and not by the terms of the condition.—Where within a year after service of the notification of a foreclosure petition the mortgagor deposited the principal debt and interest for the last year, alleging that interest for the previous years was according to the condition to be recovered by separate suit:—*Held*, that his suit for redemption must be dismissed. There had been default in payment of the interest due, and by sect. 8 the mortgage, notwithstanding the condition relied upon, had been finally foreclosed. SAYYID MANSUR ALI KHAN *v.* BABU SARJU PARSHAD - 113

RELINQUISHMENT BY DURMOKURRURIDAR: *See* BENAMI TRANSACTIONS

RESTORATION OF APPEAL AFTER DISMISSAL: *See* PRACTICE. 3.

REVERSIONARY HEIRS BARRED TWELVE YEARS AFTER ADOPTION. *See* LIMITATION

RIGHT OF WAY] Where the user of a passage by the Plaintiffs' scavengers three or four times in the year for upwards of twenty years for the purpose of removing refuse from a privy was relied upon as establishing the Plaintiffs' right of way —*Held*, that it was no breach or discontinuance of the user that the Plaintiffs admitted instead of their own the municipal scavengers to whom they were bound by law to afford free access Nor was a daily user by the latter an aggravation of the servitude, since it appeared to be reasonable and convenient and no agreement had been shown specifying times or occasions of access JUDOO LALI MULLICK *v* GOLAUL CHUNDER MOOKERJEE - - - 77

RIGHT TO REDEEM *See* REGULATION XVII OF 1806

SET OFF *See* PRACTICE 3

SUCCESSION OF MOHUNTS] With regard to the succession of mohunts, the only law to be observed is to be found in custom and practice which must be proved —Where the Plaintiff failed to prove that the deceased mohunt had the power to appoint his successor, and that the sect to which he belonged were bound to instal the disciple whom he had selected —*Held*, that his suit must be dismissed GENDA PURI *v* UMHATAR PURI - - - - - 100

SUIT FOR AN ACCOUNT *See* PRINCIPAL AND AGENT

SUIT TO SET ASIDE ADOPTION *See* LIMITATION

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DIGEST OF PRIVY COUNCIL RULINGS

By

G. S. M.

CONTINUATION OF THE ADDENDA

DOWN TO DECEMBER, 1900

ALLUVIAL LANDS.

ACCRETION.

1900. Oudh—*Reg XI of 1825, Section 40 Identity of site. Accession to another Estate*

In a suit for possession of a piece of Churland.

Held That the mere fact that a change in the river's course has placed land belonging to A in contiguity to the land of B could never deprive A of the land, and transfer it to B. That would be a claim for land gained not from the river, but from a neighbour. Neither the specific provision of the first sub-section of Section IV Reg XI of, 1825, nor the general principles of equity or justice would support such a claim, and no such local usage is presented on record.

Sardar Jagjot Singh *v* Rani Brij Nath Kunwar—I L. R. 27, Cal. 768, L R. 27, I A. 81, 4 Cal W. N. 555

APPEAL

REGULAR

See Stay of Execution

APPEAL

PRIVY COUNCIL

Leave to Appeal

CONCURRENT FINDINGS OF FACT

1900. Burmah—*Appeal, Concurrent findings of fact. No miscarriage of justice.*

Held: That the judgements of the Lower Courts being concurrent on matters of fact, they could not be interfered with according to the salutary rule laid down to that effect, unless very definite and explicit grounds for that interference, as miscarriage of justice or the violation of any principles of law or procedure, are made out.

Moung Tha Hnyeen *v.* Moung Pan Nya. —4 Cal. W N. 808

1899 Oudh—

Held. That under Sec 624 C. P. C, it is important that the reasons for granting the review should be recorded. The omission to do so, however, is not a ground for granting leave to appeal to England on an undervalue case of an ordinary nature

Thakur Shanker Buksh *v.* Bulwant Singh —L. R 27, I A. 79, I. L. R. 27, Cal. 333, 4 Cal. W N. 203.

(*i*) REMARKS AS TO UNNECESSARY PAPERS BEING INSERTED IN THE PAPER-BOOK.

1900. Mad—*Costs as regards the unnecessary papers in the Paper-Book.*

Held: That the Registrar will be directed not to include as costs any expenses occasioned by the printing of irrelevant or unnecessary matters in the bulky record of this case.

Raja Yarlagadda Malikaruna Prosad *v* Yarlagadda Durga Prosad, and another —5 Cal. W. N. 74.

CENTRAL PROVINCES

LAND REVENUE ACT XVIII of 1881.

1899 Central Provinces—*Land Revenue Act XVIII of 1881, Section 87. Succession, Joint Hindu family.*

Held: That the Hindu Law applies to succession in a joint Hindu family The Collector's award was not an award after judicial enquiry and adjudication, and therefore Sec. 87 of Act XVIII of 1881 does not bar the claim. The ordinary Hindu Law applying to undivided Estates governs the case, and that law supports the Plaintiff's claim.

Rewa Prosad Sukul *v* Deo Dutt Ram Sukul.—L. R. 27, I. A. 39, I. L. R. 27, Cal. 515, 4 Cal. W. N. 582

CONSTRUCTION OF DEEDS OTHER THAN LEASES AND WILLS.

1899. Central Provinces—*Construction of Decree, Award, Compromise and Wajibulurs, Maintenance claims.*

That under the terms of the Decree, Award, Compromise and *Wajibulurs*, the grant of the 11 villages for the maintenance of the Defendant, the junior branch of the family holding an impartible Estate, was free from payment of the Government Revenue.

Loke Nath v Bissessar Nath—I. L. R. 27, Cal. 103.

See Limitation 2.

CONTRACT.

SALE.

1899. Rangoon—*Contract. Differences in the terms of the Bought and Sold Notes. Effect of.*

Held That the Bought note signed by the Appellants contained the term in the Chinese language, that there should be no yellow grain. If the Respondents did not assent to this and insisted on the Sold note signed by them being without that term, the two notes would not agree, and a contract would not be proved by them. If the Respondents did assent, they did not perform their part of the duty by offering paddy which was free from yellow grain. In either view of the case, the Plantiffs cannot succeed in their claim for damage for breach of contract against the Defendants in not taking delivery of a large quantity of paddy.

Ah Sham Shoke v. Moothia Chetty.—L. R. 27, I. A 30, I. L. R 27, Cal. 403, 4 Cal. W. N. 453.

DAMAGE.

1900 Bom.—*Damage for malicious prosecution Malice. Want of reasonable and probable cause. Certificate to appeal given under a misapprehension*

In a suit for damage for malicious prosecution

Held: (1) That in such a suit it is not sufficient to prove that the Plaintiff was innocent. Plaintiff must further prove that the prosecution was instituted maliciously, without reasonable and probable cause.

(2) That the certificate allowing the appeal to England was granted under a misapprehension, as the High Court both in its original and appellate sides have found the fact that Plaintiff has not proved malice, and the non-existence of reasonable and probable cause. On the finding of that fact by a Court which is competent to try both the questions of fact and law, no question of law arises in this case.

Mody v. The Queen Insurance Company.—4 Cal. W N. 781.

See Contract, Sale.

DECREE.

AMENDMENT OF.

1900. Mad—*Decree, Amendment of, for a subsequent event. Section 206, 623 C. P. C.*

In execution of a decree:

Held: (1) That the High Court has no power to alter its own decree except under the provisions of either Section 206 or 623. C. P. C.

(2) That the ground for the amendment of the decree must at any rate be something which existed at the date of the decree, and the Section does not authorise the review of a decree, which was right when it was made, on the happening of some subsequent events

Kotagiri Venkata Subhamma Rao v. Villanki Venkalarama Rao.—4 Cal. W. N. 725.

EASEMENT.

LIGHT AND AIR.

1899. Bom.—*Easement, Agreement.*

Plaintiff brought the suit for a declaration that he is entitled to free and uninterrupted access of light and air to and from the windows on the south and west sides of his house, save so far as the same was obstructed by the Defendant's old house. Defendant pleaded that a letter dated the 10th May 1865, was an agreement which prevented the acquisition of any right of Easement regarding the matters.

Held: Upholding the decision of the High Court, that the promise in the said letter which was an agreement, being to the effect that no objection to those windows being blocked would be raised when the Defendant should rebuild and raise his house, prevented the acquisition of the right of Easement through the window claimed in the case, under Section 15 of the Indian Easement Act of 1882

Shultan Nawab Jung v. Rustomji N. Byramji Jijibhoy.—I. L. R. 24, Bom 156.

EVIDENCE.

ADMISSIBILITY.

1899. Oudh.—*Evidence Act, Section 34, Relevancy of Books of Accounts regularly kept though the entries were not made at the dates of the transactions.*

Held. That Books of Accounts kept in the usual course of business, and containing entries made on the authority of officers, whose

duty it was to receive and pay money are admissible in evidence under Section 34 of the Evidence Act, although the entries were not made at the dates of the transactions, and do corroborate the oral evidence adduced in the case in the matter of the payments.

The Deputy Commissioner of Bara Banki v. Ram Proshad—I L. R. 27, Cal. 118, 4 Cal W. N. 147.

2. 1900. All.—*Evidence Act Section 92 Admissibility of oral evidence to contradict statement of receipt of consideration made in a Kabala*

Plaintiff sued for the balance of the consideration money recited by him in the Kabala as having been received by him, on the ground that it was in fact not paid, but kept with the vendee for his, the vendor's, share of the costs of a suit, brought by both of them against a a stranger for recovery of possession of a property, a fractional share of which was sold to the vendee, that the suit was decreed, and in excution both of them obtained possession of their respective shares. The present suit was brought for the balance of the consideration money due.

Held: Agreeing with the High Court, that it is a settled law, that notwithstanding an admission in a sale deed that the consideration money has been received, it is open to the vendor to prove that the consideration has not been actually paid. If it was not so, facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied &c. It is no infringement of any provision of the Act to prove a collateral agreement that the consideration money should remain in the Appellant's hand for the purposes, and subject to the conditions, stated by the Respondent.

Sah Lal Chand v Inderjit.—L. R. 27, I. A. 93 I. L. R. 22, All. 370, 4 Cal. W. N. 485.

3. 1899. All.—*Evidence Act, Section 92, Admission of oral evidence, Sale or Mortgage.*

Held: (1) That Section 92, Evidence Act prohibits the admission of any oral agreement or statement as between parties to a document for contradicting and varying the same.

(2) That the question as to whether the deed purporting to be one of out and out sale and the agreement constitute a mortgage by conditional sale, or an absolute sale with a contract for re-sale within the time fixed must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

(3) Considering the condition of deposit of money, if the banker objects to receive it, which at once suggests a reference to Reg. 1 of 1798, and the other circumstances of the case, the transaction was intended to be, and was, a mortgage by conditional sale as, has been held by the Courts below.

Balkeshen Das v W. F Legge.—L. R. 27. I. A 58, I. L. R. 22, All. 149 Cal W. N. 153.

4. 1899. All—*Recital of acknowledgement of receipt in a bond. Onus of proof.*

Held That the recital in a Bond of the acknowledgement of receipt of a certain amount of money is not legally sufficient. The Plaintiff on whom the burden of proof lay must prove by evidence, when the receipt is denied, that the payment was actually made

Lala Lakmi Chand v. Sajid Haidar Shah. —4 Cal W. N. 82.

PEDIGREE.

1900. Oudh—*Evidence Act, Section 32. Pedigree to prove relationship, how to be proved. Wajibulurs.*

In a suit for possession by right of inheritance, the Defendant denied the pedigree set up by the Plaintiff, and the relationship on which he based his title:

Held: (1) That the Pedigree set up by the Plaintiff is not admissible or as the Evidence Act says, relevant. Section 32 of the Evidence Act which makes the statement in the Pedigree relevant, only applies when the statements are made by a person who is dead, or cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured without great delay or expense &c. In this case, neither the bards, the makers of the Pedigree, nor the Raja who had assembled them, was called as a witness, and no proof was given that they were within any of those descriptions which made it unnecessary to call them.

(2) That the *Wajibulurs* of a village filed, contains a statement too vague to be of any value in proof of the Plaintiff-appellants claim.

(3) That the oral evidence either does not state the source of information of the witness, or states the source of information to be the family Pedigrees which were not produced

Subjan Singh v. Sardar Singh.—5 Cal. W. N. 49.

RECORD (FOREIGN.)

1899 Cal.—*Foreign Judicial record How to be proved.*

In a suit about the validity of an adoption under the Hindu Law:

Held. (1) That Section 86 of the Evidence Act does not exclude proof other than the Certificate mentioned therein. The testimony of the official of the Sikhar Court to the effect that the suit was brought, and that Chuni, the alleged adoptee's mother gave her evidence in that suit is primary evidence of those matters. His proof of the Sikhar records is secondary evidence, and under Sections 65, 66 of the Evidence Act secondary evidence may be given of public documents which the pro-

ceedings are, when the person in possession of the documents is out of the reach of, or not subject to the process of the Court, which is the case here.

(2) Authority to adopt not proved

Haranund Chetlangi v. Ramgopal Chetlangi —L R 27, I A. 1, I L. R. 27, Cal 639, 4 Cal W. N. 429

PRESUMPTION.

1899. Oudh —*Presumption as regards property in the possession of a Hindu Widow*

In a suit by the reversionery heir after the death of a Hindu Widow

Held (1) That no presumption of law arises that the properties which were found in the possession of a Hindu widow originally belonged to her husband, even if that husband had died possessed of considerable property.

(2) That in this case the evidence does not even prove that the widow's husband had died possessed of considerable property

(3) That it is for the reversionery heir to prove that the property claimed belonged to her husband.

Dewan Ran Bijai Bahadoor Singh v Inderpal Singh —I L. R 26, Cal. 671, 4 Cal W. N. 1.

1899 Cal —*Evidence, Alluvial formation, Thack map, Value of*

Held. (1) That their Lordships do not agree with the learned Judges of the High Court, who require an amount of accuracy in a Thack map which cannot be reasonably expected from it. If the Judges of the High Court are right in their view of the accuracy which is necessary, there would be very few cases in which the owners of diluviated lands would be able to recover possession thereof when reformed. There is sufficient evidence to entitle the Plaintiffs to a decree for possession

(2) High Court decree set aside, that of the Subordinate Judge according to the Thack and survey maps giving preference to the survey map when they differed, upheld.

Mone Mohiny Devi v Watson and Co. Surna Moni Devi v Do. Hemanta Kumari Devi v. Do —L R 27, I A 44, I. L. R 27, Cal 336, 4 Cal W. N. 113.

EXECUTION OF DECREE

SALE.

(4) RIGHT WHICH PASSES BY THE SALE

1900. Bom —*Sale to stand, until set aside*

In a suit for redemption of a mortgage by the heiresses, the daughters of the mortgagor, the Defendant pleaded the sale of the mortgagor's right in execution of a decree, the execution being held against persons other than the Plaintiffs

Held (1) That the Defendant in his written statement having set up the sale, and the Plaintiff persisting notwithstanding to carry on the suit as laid in the plaint without any modification or prayer to have the sale set aside, Plaintiff cannot succeed until the execution sale held by a Court of competent jurisdiction in execution is set aside The principle laid down in the case of Jogodamba Chowdhrani v Daksohina Mohan —L R 13, I A. App 84, as to the necessity for setting aside adoption is held to be applicable to the case.

(2) That if the sale is a reality at all, it is a reality defeasable only in the way pointed out by the Law, and the case must fall either within Section 311. C. P. C or Art 12 (a) of the Limitation Act of 1877, or both, any way there exists a bar by one year's delay

Malakinjan B Pasara v Narhar Bin Shevappa—5 Cal W N 10.

IRREGULARITY IN THE CONDUCT OF SALE.

1899. Mad.—*Section 311 C P. C., Under what circumstances the decree-holder is to be allowed to bid, The amount raised by the bidding, The dissuasions of others to bid, Effect of.*

In a case under Sec. 311 C. P. C to set aside an Execution Sale on the ground of irregularities, the first Court set aside the sale on the ground that intending purchasers were dissuaded from bidding by the decree-holder, who had obtained leave to bid In appeal the High Court held that the dissuasions do not amount to fraud or irregularity, but set aside the sale on a new ground viz, that no leave to bid to the degree-holder was given in accordance to the law, as the decree-holder withheld from the Court the information as regards a certain agreement with a third person

Held (1) That the agreement in question has no direct tendency to dissuade intending purchasers from bidding.

(2) Cook v. Boswell —(1886) L. R. 11 App. case 232 referred to, as regards the information which the decree-holder in his petition for leave to appeal is or is not bound to give.

(3) That the Respondent has neither alleged nor proved the fraud on which alone he can sustain the present order. Remarks made about a new point being taken up in appeal, and the order of both the Lower Courts discharged and the petition dismissed.

Mahomed Mira Ravuthar v. Saivasi. V. R. Gopalar.—L R.27, I. A 17, I. L. R. 23. Mad 227 4 Cal W. N 228

STAY OF EXECUTION.

1899. Cal.—*Stay of execution proceeding pending P. C Appeal.*

Held That it is highly inconvenient that there should not be any *ad interim* protection at all pending a P. C. Appeal of this kind, because such a stay of proceeding can hardly be productive of injury to absent parties but

it may afford sufficient protection. The High Court in this case declined to interfere for want of jurisdiction. Proceedings stayed, Manager to continue in possession. Appellant to be answerable for damages and aggrieved party may move for discharge of the order.

Mohesh Chendra Dhal v. Strughan Dhal. Exparte Mohesh Chandra Dhal.—I. L. R. 27, Cal 1, 4 Cal. W. N 34.

See Mesne-profits 1, 2.

HINDU LAW.

ADOPTION.

AUTHORITY TO ADOPT.

1900. Cal.—*Hindu Law, Adoption, Joint power to adopt given to the widow and two other Executors.*

In a suit on the original side of the High Court for the administration of the estate of one Hurri Dass Dutt who died leaving a Will, authorising in para 8 his widow and two other Executors and Trustees to adopt 3 sons in succession, para 10 providing, "That in case of any accident arising to cause my wife to depart her natural life before adoption of a male child, my surviving Executors are empowered to act with my full consent and direction to adopt a male child." The Plaintiff alleged that he was adopted by the widow of the Testator with the consent of one of the two Executors, the other having died previous to the said adoption.

Held: (1). That no one can adopt a son to a dead man except his widow, is a rudimentary principle of the Hindu Law.

(2). That joint power to adopt was given by the Will to the widow and the two other Executors, and that such joint power is invalid under the Hindu Law.

Amrito Lal Dutt v Sarno Moye Dasi.—L. R. 27, I A. 128, I. L. R 27, Cal. 996, 4 Cal. W N. 549.

2. 1900. Mad.—*Nairs of South Malabar. Custom as to right of adoption by the Karnervon without the consent of the other members of the Taravad, not established.*

The elder of the two brothers who were the two surviving members of their *Taravad*, of which the elder brother was the *Karnarvon*, adopted four persons so as to make them members of the *Taravad*, without the consent of the younger brother After the death of the elder brother, the younger brother sued to set aside the adoption, and died after suit leaving a Will. The only question now is whether the High Court was right in deciding the adoption to be invalid.

Held: (1). That the Nairs of South Malabar are persons amongst whom polyandry is legally recognized, and descent of property through females is acknowledged law. A right of the Karnarvon to adopt females into the family or *Taravad*, when necessary to preserve it is also in accordance with their law.

Strange's Manual of Hindu Law. Sec. 403

(2). The question being, whether the *Karnarvon* could adopt without the consent of his younger brother, the onus of proving the validity of the adoption made in this case is upon those who assert its validity

(3). That the powers of the *Karnarvon* are essentially the powers of management, and his power of alienation is limited In the absence of proof, it would be contrary to sound legal principles to hold that any such power of adoption without the consent of the other members of the *Taravad* was conferred by any legal custom.

(4). The existence of any such alleged custom not being satisfactorily proved, the decision of the High Court declaring the adoption invalid is upheld.

Thirnthipalli Ramon Menon v. Varianga-thel P. R. Menon.—4 Cal. W. N. 810.

EFFECT OF ADOPTION.

1899. Mad.—*Hindu Law, Adoption by husband in conjunction with the junior wife, Inheritance.*

A Hindu died leaving an adopted son and two widows, the son being adopted by him in conjunction with the junior wife. The adopted son having inherited the impartible family estate died shortly after.

Held: That the junior wife, joining with whom the husband had adopted the son, stands in the position of the adopted son's natural mother, and is alone entitled to inherit the impartible family estate. Calcutta High Court ruling in Kashishwri Debi v Greesh Chunder Lahoree.—(1864) W. R Sup. Vol. 71 approved.

Annapurni Nachiar v. Forbes.—I. L. R. 23, Mad. 1.

FAMILY CUSTOM.

PRIMOGENITURE

1900. All.—*Hindu Law, Family custom, Primogeniture Wajibulurs.*

In a suit by the younger of the two brothers of a Hindu family known as the Beswan family, for his share of the family Estate by right of inheritance under the ordinary Hindu Law, the Defendant, the elder brother pleaded that the custom of primogeniture exists in the family, and that the Plaintiff is entitled to maintenance only.

Held: (1) That a special family custom involving a departure from the ordinary Hindu Law, should be properly proved, but in this case the Defendant-appellant has satisfied the burden of proof.

(2) That the *Wajibulurs* of 1862 and 63 are no doubt evidence in favour of the Plaintiff-respondent; and that the later one of 1873 in favour of the Defendant-appelant is merely

an expression of opinion or aspiration of one person only, and much reliance ought not to be placed upon it. But the *Waitbulurs* of 1862 and 1863 mentioned above are not sufficient to out-weigh the evidence afforded by the acting of the parties, and actual descent of the Estate, and other evidence in favour of the Defendant-appellant.

Garurudwaja Pershad *v.* Saparandwaja Pershad.—5 Cal. W. N. 33.

MAINTENANCE.

1899. All.—*H. L. Maintenance of a son of an illegitimate son, Redemption of Mortgage.*

The son of an illegitimate son of a Hindu of the twice born classes, sued for the redemption of a mortgage of a property out of which his father used to get maintenance

Held, (1) That under the Hindu Law, amongst the twice born classes, an illegitimate son takes no part of the inheritance but is only entitled to a simple maintenance from the estate of his father under Sections 11 and 12 of the Mitakshara, which seems to confer on him a personal right, not heritable by his heirs.

(2) Plaintiff having no title, his suit has been properly dismissed.

Roshan Singh *v* Balwant Singh.—L. R. 27, I. A. 51, I. L. R 22, All 191, 4 Cal. W. N. 353.

1900 Mad.—In two suits for maintenance instituted by two younger brothers, (one of whom had failed in a previous suit for partition of the family Estate on the ground that the family Zemindary was impartible, but obtained in that suit a decree for possession of one-third of a small property not forming a part of that Zemindary) against the eldest brother who was in possession of that family Zemindary.

Held: (1) That the family has not become a divided one, simply on account of the decree for partition of an insignificant portion of the family property, which had no relation whatsoever with the family Zemindary Estate, and the right to maintenance as a junior member of the family has not been lost thereby.

(2) That the amount of maintenance has been properly fixed by the District Judge, whose experience of the District is fully recognized

(3) As to the claim for arrears of maintenance for 12 years previous to suit, the High Court declined to confirm the first Court's decree regarding the same on the ground that wrongful withholding of the maintenance has not been proved by the Plaintiffs. Although the High Court is right in holding that non-payment of maintenance does not necessarily give a person entitled to it, a right of action for the arrears, yet it constitutes *primafacie* proof of wrongful withholding, liable to be rebutted by the evidence and circumstances of the case.

(4) That in this case, without some such ground of defence that the Defendant had been misled into the belief that the claim for maintenance was abandoned, and has in consequence not set aside any portion of his annual income to meet such a claim, the younger brothers could not be held to have forfeited an undoubted right merely because they were in the first instance advised to institute a wrong suit and did not claim their maintenance as it fell due. The denial by the Defendant in the previous suit, of the Plaintiff's right to maintenance shows that he would not have willingly paid it if claimed. The Plaintiffs are therefore entitled to maintenance for any period not excluded by the Law of Limitation, as decreed by the Court of first instance

Yarlagadda Mallikarjana Prasada *v.* Raja Yarlagadda Durga Pershad Yarlagadda Mallikarjana Prasada *v.* Raja Yarlagadda Venkata Ramaharya Swami.—5 Cal. W N 740.

MARRIAGE AND LEGITIMACY.

1900 Cal.—*Marriage, Weight of evidence to prove the same.*

In a suit for suitable maintenance by an alleged widow of one Raja Ram Das Byragi, Zemindar, calling himself a Mohunt, the Defendant denied the Plaintiff's marriage

Held: (1) Differing from the High Court that the alleged marriage has been proved by the strong body of oral evidence adduced in the case, and some of the circumstances thereof. The circumstances of improbablity relied upon by the Defendant are not such as to outweigh that evidence Suit decreed for maintenance at the rate of Rs. 500 a month.

Luchmi Koer *v* Roghu Nath Das.—L. R. 27, I. A. 142, I. L R 27, Cal 971, 4 Cal. W. N. 685.

RELIGIOUS ENDOWMENT.

1899. Mad.—*Religious Endowment, Void transfer of management, Adverse possession, Limitation Act, Arts. 124, 144.*

The hereditory managers of a Religious Endowment sold their right of management to a third person, for valuable consideration in 1868 and 1869, and the purchaser obtained possession. The Plaintiff, who is the son of one of the alienors, who died in August 1884, attained his majority in February 1891, and brought the present suit on the 17th August 1891 for a declaration that the transfer of 1868 and 1869 were void and inoperative, and that he was the rightful manager, as well as for possession and mesne-profits.

Held: (1) That according to the decision L. R. 4, I. A. 76, the transfers by the managers of an Endowment of their right of management thereof, were beyond their legal competence. Consequently the deeds of sale are void, and did not give any title to the purchaser.

(2) That the possession of the vendee was adverse to the vendors and their heirs.

(3) That more than 12 years from the date of sale having expired during the lifetime of the Plaintiff's father, the right to sue was extinguished during his lifetime, and the Plaintiff cannot now sue simply because the suit is brought within 3 years after the attainment of his majority.

(4) That successive life-estates pleaded by the Plaintiff cannot be created under the Hindu Law. Tagore, v. Tagore, L R. I. A. Sup Vol. 47 at p. 60, and therefore Plaintiff's right to sue did not accrue on the death of his father through whom he must be held to claim. The suit is therefore barred by 3 years, as well as by 12 years' limitation under Arts. 124 and 144 of the Limitation Act

Gnana Sambanda Pandara Sannadhi v. Velu Pandaram —L. R. 27, I. A. 69, I. L. R. 23, Mad. 280, 4 Cal. W N. 329.

1899. Cal —*Hindu widow, Presumption as regards property in her possession.*

In a suit by the reversionary heir after the death of a Hindu widow:

Held That no presumption of law arises that the properties which were found in the possession of a Hindu widow originally belonged to her husband, even if that husband had died possessed of considerable property. The reversionary heir is bound to prove the same, which he has failed to do in the present case.

Dewan Ran Bejoi Bahadur Singh v Inderpal Singh.—I L. R 26, Cal. 871, 4 Cal. W. N. 1.

WILL

Proof of.

1899. Cal.—*Probate of a Will when to be granted.*

Held That when the execution of a Will and the disposing mind of the Testator are proved, probate ought to be granted. The knowledge and approval of the Testator of the contents of the Will are necessary to be proved only when circumstances exist to excite the suspicion of the Court in the matter. Tyrrel v. Painton, 1894, p 151.

Shama Charn Kundu v. Khettro Moni Dasi.—I. R 27, I A 10, I. L. R. 27, Cal. 521. 4 Cal W. N 501.

Construction of.

1900 Mad —*Hindu Will, Construction of, Bequest to a person kept as an adopted son, whose adoption is not proved.*

In a suit for the construction of a Hindu Will

Held That the gift to the minor is not conditional on adoption. The Testator no doubt refers to the minor as his adopted son, but he explains what is meant by that expression by stating that he had been keeping the minor "as adopted son," that is with a view to his adoption. The minor was entitled to the Estate although he was not validly adopted by the Testator.

L. R 26, I A. 83, does not apply. The Will in this case is more like the Will in L. R 3, I. A. 253.

Subbarayer v Subbammal.—4 Cal. W. N. 805

INTEREST.

See Mesne-profits 1. Transfer of Property Act.

LXIX. LANDLORD AND TENANT.

Arrears of Rent.

1899. Cal.—*Rent suit, Plea of payment, Evidence, Onus of proof.*

In a suit for rent of land held by the Defendant under leases executed by the Defendant's grandfather, the Defendant pleaded payments.

Held: That the Plaintiff relies on leases which only shew when the rents fell due. Her Amlas who have been examined are silent on the crucial point of payment, and her Dewan is kept out of the way of examination. Defendant's Amlas testify to the payment, and the Books kept by them corroborate their statements. The evidence given by the Defendant, though not what might have been expected from a man of his position, is nevertheless sufficient to throw upon the Plaintiff the *onus* to rebut the same, which she has failed to do.

Rameswar Koer v. Bharat Pershad Sahi. —4 Cal. W. N. 18.

Right which passes by Rent sale.

1899. Cal.—*Effect of Rent sale.*

Held: (1) That a sale of a tenure in 3 execution cases of 3 exparte Rent decrees for 3 separate periods, the first against one brother, the second against two brothers, and the third against all three brothers is valid, and operates to pass the entire tenure to the Decree-holder, Auction purchaser.

(2) That the Decree-holder having elected to execute against only one brother, that does not operate as an *estoppel*, the truth of the matter appearing on the face of the proceedings, and that neither in form nor in substance, any injustice was done to the other two brothers.

Tara Lal Singh v. Sarobar Singh.—L. R. 27, I. A. 33, I. L. R. 27, Cal. 407, 3 Cal. W. N. 533.

LEGAL PRACTITIONERS.

Vakeels.

1899. All.—*Vakeels, Conviction of forgery, Cancellation of certificate &c.*

Held That when a Vakeel is convicted of forgery, and sentenced to two years rigorous imprisonment, that is sufficient without further enquiry to justify the Court to remove him from the roll of Vakeels, and to cancel his certificate.

Rajendra Nath Mukerji, Vakeel, in the matter of —3 Cal. W N. 736.

LIMITATION.

IN SUITS FOR IMMOVABLE PROPERTY

ADVERSE POSSESSION

1899. Mad.—*Limitation, Adverse possession.*

In a suit for possession of land, Defendant who was admittedly in possession for more than 7 years, pleaded limitation by adverse possession for more than 12 years.

Held That the Defendant has produced a body of consecutive documents to prove his possession for more than 12 years, and the burthen of proving the same which originally rested on him has been amply sustained by him. Against that body of evidence, the Plaintiff has produced only oral evidence to which little weight can be attached. Limitation therefore bars the Plaintiff's claim.

Innasimuthu Udayan v. Upakarath Udayan. —I. L. R, 23, Mad 10

1899. Cal —*Limitation, Grant for maintenance, Construction of, Declaratory suit, Illegal admission of counsel, Istemrari tenure, Meaning of, Possession adverse.*

Held: (1) On a proper construction of a Maintenance grant, and a subsequent Ekrarnama by the grantee that the grant was not perpetual, but was only for the life-time of the grantee The Potta given by the grantor, though it purported to be a permanent Potta, came to an end, on the death of the grantee

(2) Istemrari Mokurari tenure is not necessarily a perpetual hereditary tenure.

(3) The Defendant being found on evidence to hold the land for his life, receipt of rent from him, and suit for rent against him do not prejudice the suit for possession after his death.

(4) That mere notice by the life-tenant that he claimed to hold on a perpetual tenure would not make his possession adverse so as to bar a suit for possession after his death.

(5) That neither Art. 91 Sch II of the Limitation Act, nor Section 39 of the Specific Relief Act compels a person to bring a suit for declaration of title, though he might have brought it if he chose.

(6) That illegal admission of a Counsel does not bind the client

Beni Pershad Koeri v. Dudh Nath Roy. —I. L R 27, Cal. 156, 4 Cal. W N 274.

POSSESSION

ADVERSE

1899. Cal.—*Adverse possession by Plaintiff for more than 12 years*

In a suit for possession of some Chur-land, Plaintiff claimed on a title by adverse possession for more than 12 years.

Held That Plaintiff's alleged title by adverse possession for more than 12 years before diluviation, while under water, and after reformation, has not been proved, and his case fails accordingly.

Udit Narain Singh v Golab Chand Saha —I. L. R. 27, Cal. 221.

1900. Cal —*Suit for Chur-land, Survey map, Title by adverse possession.*

Defendant having a possessory decree of some Chur-land passed by the Magistrate in his favour, the Plaintiff sued for possession of the same.

Held: (1) That the second Survey map having rectified the first Survey map which was in Plaintiff's favour, the title of the Plaintiff is not made out thereby.

(2) That the evidence of possession given by the Plaintiff is not satisfactory, and does not make out 12 years adverse possession in continuity, in publicity and extent against the Defendant.

Radhamoni Debi v. The Collector of Khulna —L. R. 27, I A. 136, I. L R 27, Cal 943, 4 Cal. W. N. 5 7.

MESNE-PROFITS.

1. 1900. Cal.—*Execution of decree for Mesne-profits, Mesne-profits include interest, Proper mode to ascertain the Mesne-profits.*

In execution of a decree for possession, and Mesne-profits to be ascertained in execution, the Sub-Judge after delivery of possession calculated the Mesne-profits mostly in accordance to the assessment thereof made by the Ameen The High Court remanded the case for fresh assessment of the Mesne-profits.

Held: (1) That the Defendant being a person in wrongful possession, the Ameen was right under Sec. 211 C P.C., when the Defendant did not produce his proper accounts, nor caused the Dakhillas of the tenants to be produced, to measure the land and ascertain from the rates of rent &c., what the Defendant might with ordinary diligence have received therefrom.

(2) That the Court was not bound to take further evidence after the Ameen's papers were submitted, without being satisfied that there was good reason for receiving such further evidence.

(3) That the effect of a decree which grants Mesne-profits, and says nothing about interest, is that under the definition of Mesne-profits as given in Sec 211, that the decree shall carry

DIGEST OF PRIVY COUNCIL RULINGS

BY

G. S. M.

CONTINUATION OF THE ADDENDA

DOWN TO JUNE, 1899.

ACCOUNTS.

1899 Mad.—*Accounts, Manager of a Joint Hindu family, Agreement, Construction.*

In a suit for account :—

Held : That under the terms of the Agreement, which provides that the division, when made, is to be made after settling the profit and loss accruing up to that date, the Defendant, the manager of the Joint Hindu family was an agent, and was liable to give accounts.

(2) That the property taken lease of by the Defendant from Government by giving security of his own share was not joint property.

Rajah Satru Cherla Rama Bhadra *v.* Rajah Setru Cherla Vira Bhadra.—3 Cal. W. N. 533. L. R. 26 I. A. 167.

ALLUVIAL FORMATION.

ACCRETION.

5. 1899. Mad.—*Accretion to riparian Estate. Lunka, Vertical accretion, New point not raised in the first Court.*

In a suit for a formation of land in the river Godaveri, called Lunka (which includes island Churs as well as accretions to the banks of the river) :—

Held : (1) That there is a concurrent finding of both the Indian Courts that the *Lunka* in question is an accretion to the Defendant's Estate, Tatapati, and not a vertical accretion in the bed of the river.

(2) That there does not appear in Madras, as in Bengal, an express law, that gradual accretion accrues to the land to which it is attached, but the rule, though unwritten is equally established, and applies to land which the river washes on both sides as well as to land which is washed only on one side.

(3) That the Plaintiff failing to prove his case of accretion to his Estate, as laid in the plaint, cannot be permitted to raise in appeal a new case as regards his right of subaqueous ownership.

Sri Balsu Rama Laksmamma *v.* The Collector of Godaveri.—L. R. 26 I. A 107.

APPEAL P. C.

2. 1898 Cal.—*Special leave to appeal.*

The question of law being as to the jurisdiction of the Commissioner to interfere with a sale held under Acts VIII of 1868 B C. and VII of 1880. B. C after the expiry of 60 days :—

Held : That the case involves a serious question of law, and the special leave to appeal applied for be granted.

Gooneshar Singh *v.* Mohunt Gonesh Das.—8 Cal. W. N CCXXXVIII.

BANK.

1898. All.—*Purchase of Bank Shares, Falsity of Balance Sheets, Misrepresentation and Inducement.*

In a suit by the Plaintiff-appellant on the allegation that he was induced to purchase certain shares of the Himalaya Bank in 1890 on the faith of the false representations of the Defendant-respondent, made, as a Director by the publication of false balance-sheets of the Bank, and also as a private individual by misrepresentation and inducement, and that the Bank stopped payment and went into liquidation, shortly after in 1891, the latter pleaded that he did not induce him to make the purchase, and did not make any false statement or misrepresentation :—

Held : (1) That both the Lower Courts have concurrently found that the balance sheets issued since 1887 were false, but the Defendant was not responsible for them, they being prepared by the Manager of the Bank, and that the Directors were acting upon representations made to them by the said manager. It is therefore unnecessary to consider the evidence regarding the same ;—

(2) That on the entire evidence in the cause including the letters of the Plaintiff himself, the Plaintiff has failed to prove that in buying the shares he had acted upon, or had been induced by any false representation, for which the Defendant-respondent is liable. Appeal dismissed.

Macanlitte *v.* Wilson—L. R 26 I A. 6, I. L. R 21 All 209.

BENAMI.

1. 1898 Cal.—*Benami, Evidence, Hibba Belwas.*

Held: That on the entire evidence and circumstances of the case and in concurrence with the decision of the first Court, the *Hiba belwas* of certain houses and parcels of land in Calcutta by a Mahommedan lady in favour of her son-in-law for Rs. 100, and a copy of the *Koran*, was not a real, but a pure nominal or *benami* transaction.

Nirmul Chunder Banerjee *v.* Mahomed Saddik —L. R. 25 I. A. 225 I. L. R. 26 Cal. 11

2. 1898 Oudh.—*Benami purchase, Payment of consideration is not the only criterion, Possession.*

In a suit by the Plaintiff for possession of a village after declaration that it was purchased by him in the *benami* of the Defendant, whose answer to the suit was that the Plaintiff had purchased the village for him, and intended it to be a gift in return for his services :—

Held : (1) That in many, it may be said, in most cases of alleged *benami*, the fund from which the consideration came, is a very important fact, but it is not the only criterion. Here the payment of the consideration by the Plaintiff is consistent with the Defendant's case, and in such a case, a much more important fact is the actual possession or receipt of the rents of the property.

(2) That the Plaintiff admitted that the Defendant was "in possession of the collections," and had not accounted for them to him for nine years and half, and his explanation why the accounts were not given is not proved nor sufficient.

(3) That the Defendant had clearly some claim upon the Plaintiff's generosity. He was in his service from 1867 to 1887 receiving only Rs. 10 as his monthly pay, and performed some valuable services for him. He was the manager of an estate of the Plaintiff in the Sunderbuns, which was purchased by the Plaintiff for Rs. 4000 or Rs. 5000, and was sold by him for Rs. 39,000 or Rs. 40,000.

(4) That although *benami* transactions are very common in India, the deed of sale in this case is not a *benami* transaction and the appeal should be dismissed.

Pundit Ram Narain *v* Mahomed Hadi—L. R 26, I. A. 38, I. L. R. 26, Cal. 227, 3 Cal. W. N. 113.

CARRIERS' LIABILITY.

1898 Cal.—*Carriers' liability, Negligence, Damage, Onus of proof.*

In a suit for damage against the Defendants under the Carriers' Act (III. of 1865) :—

Held : (1) That the onus lay on the Defendants, the carriers, to prove that there was no negligence on their part, and that the fire originated from causes over which they had no control.

(2) That the Defendants have failed to discharge that onus, that the jute caught fire about half past twelve in the night, and the whole cargo was burnt, that the watch was not sufficient, and that when the fire did take place, and did take place from within, there was an utter absence of any power of extinguishing it except by the primitive mode of the crew throwing buckets of water upon it, the two pumps in the boat being utterly useless for the purpose.

The Rivers Steam Navigation Company *v.* Choutmull Doogar.—L. R. 26, I. A. 1 I. L. R. 26 Cal. 398, 3 Cal. W. N 145.

CONCURRENT FINDINGS ON A QUESTION OF FACT.

1898 Cal.—*Concurrent findings on a question of fact. No new point allowed to be taken with regard to two out of the many Defendants.*

Held : (1) That the point in dispute was simply a question of fact, *viz.*, the nature of the Defendants' holding Both the Lower Courts having concurrently found that question in favour of the Defendant, the appeal is dismissed.

(2) That the distinguishing features in the case with regard to two of the Defendants, relied upon, did not form a part of Plaintiffs' case. There was no issue regarding them, nor proper examination of the case regarding them. The High Court was right in not allowing the same to be raised.

Nam Narain Singh *v* Bhim Gaujhee.—3 Cal. —W. N 249.

COMPROMISE.

1899 Mad.—*Compromise, Registration, Act VIII of 1871.*

On the successive deaths of the widow, daughter and mother of one Ramswami Mudali, his reversionary heirs brought a suit in 1885 against the said daughter's daughter for possession of the properties of his Estate, except certain lands which were sold by them to one V. to provide themselves with funds to meet the expenses of the litigation. That suit was amicably settled by two documents, one called "an agreement of union" by which the parties agreed to have all the lands claimed in that suit as well as those excluded from the suit divided half and half, and by another document called the Razeenama, which made mention of the settlement as regards the lands in dispute in that suit, as also by way of remark made mention of the settlement as regards the land above-mentioned which were excluded from the suit The Subordinate Judge passed the decree relating to the lands in dispute according to the terms of the compromise. Neither of the two documents were registered under the provision of Act VIII of 1871, although for properties admittedly beyond the value of Rs 100, and the agreement of union was

not even filed in the suit. The fact that both parties were in possession of the lands both in and out of that suit half and half, since shortly after the date of the compromise, has not been disputed.

In 1888 V brought a suit for possession of his purchased lands. The Defendants pleaded the amicable settlement, above mentioned. The Subordinate Judge held that the transaction was one not of sale but of loan, and gave V a decree for Rs. 3000, which the appellate Court increased to Rs. 4000. The present suit is brought by the said reversionary heirs for possession of the remaining half of the lands which were excluded from the suit of 1885:—and of which the Defendant-appellant was in possesson.

Held: (1) That the "Agreement of Union" was not registered under the provision of Act VIII of 1871, and therefore its stipulations are ineffectual in law to create any title in favour of the Defendant-appellant in the lands in dispute.

(2) That the Razeenama, though not registered was acted upon judicially in the suit of 1885 so far as regard the lands in dispute in that suit, and was in itself a step of judicial procedure not requiring registration, and any order pronounced in terms of it constituted *res-judicata* binding upon the parties.

(3) That the order in that suit, if it had referred to or narrated these terms of compromise would no doubt have been judicial evidence available to the Defendant-appellant, but that was not done—The Razeenama merely referred by way of remark to the lands now in dispute, and the judge was only asked to give effect to the compromise which related to the lands then in dispute, and so far as regards the lands then excluded, and now in dispute, the parties deliberately left themselves to stand upon their unregistered 'Agreement of Union.'—Appeal dismissed.

Prannal Annee *v.* Lakshmi Annee.—3 Cal.—W. N. 485. L. R. 26 I. A. 101.

EVIDENCE.

7 1898 Bom.—*Evidence, Punchayet Report, Pedigree.*

Held: That the report of the Punchayet dated in 1819 regarding the pedigree of the family is conclusive evidence until the contrary is proved. It does not appear whether any formal order was made on the Report, and there is not in the Record any order of reference or formal statement of the case, to show what was the precise subject of the decisions, but nevertheless the said report was filed and preserved in the Collector's Office, whence it is now produced. A minute local enquiry into the history of the family took place before a competent tribunal, and their findings are strong evidence in matters of family pedigree. The parties to the suit were the heads of the two family lines that are now disputing, and had signed the report, each saying that he agreed to what is stated in it. There is great suspicion that the report was a little tampered with on behalf of the Plaintiff, but the original words are clearly legible, and the authenticity thereof is unimpeached, and it proved the Defendants' case, and Plaintiff has failed to prove his title. Ajab Singh *v.* Nanabhau Dhaulat Raul—3 Cal. W. N. 130. L. R. 26 I. A 48.

8 1898. Cal.—*Evidence, Banker, Onus of proof, Appropriation.*

Held: That the Bank might honestly and reasonably have believed from the previous transactions with the Indigo concern that the Rs. 25,000 were intended to be applied in the same manner as the payments had been applied in the previous accounts. It was not proved that the Bank had any intimation of the change of the proprietorship, and the manager was one and the same. The burden of proof was not on the Bank in the matter.

Ram Partab *v.* Marshall.—3 Cal. W. N 313.

9. 1899. All.—*Evidence, Res-judicata, Constructive Estoppel.* In a suit by the Plaintiffs against the Defendant for possession of 4 villages as appertaining to a Hindu shrine, the Defendant pleaded the judgement of the High Court in a previous *suit* as *res-judicata.* The Subordinate Judge held that the villages in dispute belonged to the shrine, and that under the Ikrarnama of 1868 which is found genuine, the Defendant, even if he be the heir of Pershad Gir, cannot retain possession of the said villages, as the Plaintiffs were entitled under that deed to oust Pershad Gir for his misconduct and claim as his own property. In appeal the High Court held that the present case is barred by *res-judicata*:

Held: (1) That there is no such thing known to the law as constructive estoppel, and even if there were, it would not satisfy the requirements of Sec. 13 C. P. C.

(2) That "the conditions for the exclusion of jurisdiction on the ground of *res-judicata* are," as Willes J. says in Langmead *v.* Maple, 18 C. B. N S. 270 (1865), "that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." That is just what Sec. 13 requires; there must be a final decision. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left "untouched and undecided."

(3) That the High Court decree is set aside and that of the Subordinate Judge restored.

Parastam Gir *v.* Narbada Gir.—3 Cal W.N. 175. L. R. 26 I. A. 175.

10. 1899. All.—*Evidence Act, Sec. 34. Proof of payment, Costs.*

In a suit for Rs. 8000 with interest:

Held: (1) That the sum of Rs. 2500 admitted by the Defendant to have been received, has not been proved to have been repaid. That amount is decreed with interest. Costs of the Court below to be proportionately paid. Each party to bear his own costs of this appeal.

(2) That the word relevant in Sec. 34 of the Indian Evidence Act means admissible.

Lala Lakmi Chand v. Sayed Haider Shah 3 Cal W. N. CC I NIX

HINDU LAW.

3. 1898 Bom —*Adoption, Condition precedent, Will, Construction of, Appeal after attainment of majority.*

A Hindu of Bombay made a Will on the 8th February 1886, the day previous to his death by which after giving good many legacies and directions, the Testator in the 28th paragraph stated, "There is my nephew, Madhowji Katchra's son, Keramsi Madhowji, now (living) He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my life-time, then my son Liladhar's widow is to take the said Keramsi in adoption His adoption ceremony, (dattarthan) is to be performed. My property which may remain as a residue after all the things mentioned in my Will have been done, I give to the lad as (his) inheritance. And (I) appoint (him) as my heir "

Liladhur's widow declining to adopt Keramsi, he brought a suit for the construction of the Will on the original side of the High Court, and the High Court in October 1887 during the life-time of the said widow decided that until adoption, Plaintiff Keramsi was not entitled to the residue. After Keramsi attained his majority, he, in 1895, obtained leave to appeal against the said decision, and the Appellate Court affirmed the decree appealed against, in February 1896 Hence this appeal.

Held : (1) That the translation of paragraph 28 as given by the Appellate Court differs from the official translation, and if the Appellate Court is right as to that translation no question can be raised on behalf of the Plaintiff. But their Lordships not being able to read the original for themselves, must abide by the official translation (above given).

(2) That on such a peculiar Will, it is hardly a profitable task to weigh each verbal criticism in very nice scales, the more particularly as several of the expressions, relied on, are double-edged, and may be used one way or the other with nearly equal force. The meaning of the Testator is very obscure, but the arguments adduced to support the decree are such that their Lordships would not be justified in disturbing it. Appeal dismissed.

Keramsi Madhowji v. Kesandos Nathoo. —I. L. R. 23 Bom 271.

4. 1899. Mad :—*H. L Right of the Adopted son, Power of the adoptor to alienate by Will, False description of the person named. Effect of.* Plaintiff-appellant, the adopted son of the late Raja of Pittapur prayed for a declaration that the second Respondent was not the son of the late Raja, and that the Will which has been set up by him was invalid The second Respondent admitted the Plaintiff's adoption, and asserted that he himself was the begotten son of the late Raja, that the Will was absolute and unconditional, that certain property left by the late Raja was impartible, descending to the begotten son alone, and that the Plaintiff as the adopted son was entitled only to one-fifth share of the self acquired property. The District Judge declared that the second Respondent was not the son of the late Raja, and that the Will in his favour was wholly *ineffectual* and invalid The High Court reversed that decree and dismissed the suit.

Held : (1) That by adoption the late Raja had given the Appellant the same right of inheritance as a natural son would have. An adopted son could not be in a higher position than a natural son. The adoptive father by the adoption would not deprive himself of any power which he might have by law of alienating his property or at least of disposing of it by a Will. There is no implied contract to the contrary.

(2) That as the District Judge decided that the second Respondent was not the natural son of the Raja, and the High Court deemed it unnecessary to determine this issue, it must for the purpose of deciding the validity of the Will, be assumed that he is not.

(3) That the three successive Wills of the Raja made and confirmed the gifts in favour of the second Respondent as his *aurasa* son. That there is therefore a gift by the Will to the second Respondent, and that the false description which must at present be assumed does not vitiate it. L. R. 12 I. A. 72., Fanindra Deb Raikat v. Rajeswar Das is distinguishable The words of the *Angikarputro* in that case differ widely from the words of the Will in this case.

(4) That the estate is said to be possessed free from co-parcenery rights in others According to the decision in Surtaj Kuari v. Dedraj Kuari 15 I. A. 15, the Appellant did not become a coparcener with the Raja. If the Raja had power to alienate he might do it by Will, and the title by the Will would have priority to the title by succession. The Raja's power to alienate is not therefore restricted by the Mitacshara.

(5) Several decisions of the Madras High Court referred to, and their Lordships held that in their opinion this is not a case to which they should apply the doctrine that where there is a long course of decisions, they ought not to be reversed and the law be thus altered. The appeal is dismissed.

Sri Raye Rao Venkata Surya Mahipati Rama Krishna Rao Bahadoor v The Court of Wards and Kumara Mahipati Surya Rao.—3 Cal W. N. 415 L. R. 26 I. A. 83.

5. 1899. All—*H. L. Adoption of Mother's sister's Son, Legally invalid.* The sole question in this case is whether the adoption by Madho Singh, a Kashatriya, of his mother's sister's son, is allowed by the Hindu Law .

Held : (1) That the rule of law that a mother's sister's son cannot be adopted under the Hindu Law, is derived in the first place from the sacred texts which underlie all Hindu Law, and secondly from books of high authority in the Benares School as well as in others. It has been affirmed

by Courts of Justice in all parts of India, and in many law suits in which the parties were subject to the law of the Mitacshara which is of the highest authority in the Benares School It is not shown nor even asserted that there is any thing peculiar in the Benares School to make this rule inconsistent with its principles For 80 or 90 years there has been a steady current of authority one way in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and that their effect is to make such adoptions wholly void. The law has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one.

(2) That the said rule of law would prevail unless some valid local tribal or family custom is proved to the contrary. which has not been done in the present case. The High Court has erred in tying down the Plaintiff to the obligation of showing a custom to prohibit the adoption in question.

Bhugwan Singh and others *v.* Bhugwan Singh (minor) and others.—3 Cal W. N. 454 L. R. 26 I. A. 153.

6. 1899. Mad. and All :—*H. L. Adoption of an only son, Legally valid.* The important question in these two cases is whether the adoption of an only son is or is not valid under the Hindu Law.

Their Lordships after referring to good many texts and authorities of the Hindu Law on the point, decided the question in the affirmative, holding.

(1) That the old books looked as divine, give to the father plenary power over his sons, but discountenance the giving of an only son in terms which may be construed as a positive command making the gift void, or as a warning pointing out the mischief of the act, but leaving individual men to do it at their peril. The books contain no express statement which kind of injunctions is meant, but the practice of such adoptions is frequent.

(2) That as regards authority, private commentators are at variance with one another, judical tribunals are at variance with one another and it has come to this, that in one of the five great divisions of India, the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice, as of the law of restriction. The final judicial authority rests with the Queen in Council.

(3) That on the examination of the Smritis, they are by no means equally balanced between the two constructions, but with a decided preference in favour of that which treats the disputed injunctions as only monitory, and as leaving individual freedom of choice, and that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

(4) That being placed in the position of being forced to differ from one set of Courts or the other, so far as the fear of disturbance can affect the question, if it can rightly affect it at all, they incline in favour of the law which gives freedom of choice, and it is a matter of satisfaction that their interpretation of the law results in that course which causes the least amount of disturbance.

Madras case.—Sri Balusee Gurulingaswami *v.* Sri Balusee Rama Lakshmana

Allahabad case —Radha Mohun *v.* Hardai Bibi.—3 Cal. W. N. 427 L R 26 I. A 113.

FAMILY CUSTOM.

5 1899. Mad —*H. L. Inhertance, Primogeniture, Custom Concurrent finding, Order of mother's marriage.*

In a suit in which the question was, which of the other two sons of the deceased proprietor of an impartible estate decending to a single heir according to the rule of primogeniture, is entitled to succeed to it on the death of his eldest son, the uterine brother of the Defendant, and the step-brother of the Plaintiff who is senior in age to the Defendant.

Held : (1) That the Indian Courts having concurrently found that according to the custom prevailing in the Satpur Zemindari, and other Zemindaries held by the Zemindars of the same caste, in Madras and the neighbouring districts, the Defendant is entitled to succeed in preference to the Plaintiff by reason of his, Defendant's mother having been married prior to the Plaintiff's mother, such concurrent finding must be held to be conclusive.

(2) The question as to which lands were within, and which lands were without the Zemindari, was not raised in the Court of first instance, and therefore could not be permitted to be raised in the Appellate Court.

Sundaralinga Sawmi Kamaya Naik *v.* Rama Swami Kamaya Naik.—L. R. 26. I. A. 55.

H. L. WIDOW'S ESTATE.

3. 1898. All.—*H. L. Widow or Daughter, Power of alienation, Legal necessity, The Touch stone, Onus of proof, Purda lady, Son under father's influence.*

Raja Khairati Lal died in 1866, leaving his widow Rani Hulas Kower as his heiress and a daughter Achan Kower, who was married to Raja Lalji The daughter had a son Inayet Singh, and another who died some time after in 1881. Hulas Kower died in 1878, and Raja Lalji died about 1888 —Raja Lalji had, during his life-time managed the Estate of Raja Khairati Lal since his death, the Estate consisting of immoveable properties, as well as money lending and *hundi* business. He had

an Am-Mookteyarnama executed in his favour in March 1877 by his mother-in-law, wife and son (the last being then a minor), authorising him amongst other things, to borrow money, and execute mortgages, transfers &c. In December 1877 Raja Lalji executed a mortgage bond as such Am-Mokteyar, and in 1881 another mortgage bond was executed with the seal of Achan Kowar affixed by her husband Raja Lalji, and signed by Inayet Singh, then of age. In a suit by the mortgagees of the two bonds for the money due, by the sale of the mortgaged properties of Raja Khairati Lal's Estate, against Achan Kowar and Inayet Singh:

Held: (1) That to give validity to the bonds as against the said estate, Plaintiffs-appellants must show that there was legal necessity for the same, or at least reasonable grounds or representations for crediting the existence of such necessity.

(2) That Achan Kowar was a *purda* lady, that the nature and effect of the documents were not explained to her; and that Inayet Singh was a minor during the execution of the Mookteyarnama and the first mortgage, and was completely under his father's influence during the second mortgage, and the nature and effect of the deeds were also not explained to him.

(3) That there is no proof of any legal necessity, or of any representation to that effect.

(4) That in a suit like the present, on a bond made by a person with restricted power of alienation, the Defendants are not required to plead the absence of legal necessity. It is for the Plaintiff to allege and prove the circumstances, which alone will give validity to the mortgage.

(5) That the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided Hindu family, and even in the case of the latter, with regard to the other members, "the touch-stone of the authority is necessity."

(6) That there is no explanation why the expenses of Lalji's daughter's marriage should be paid out of Khairati's Estate, instead of his, Lalji's Estate.

(7) That there is no exception from the restriction on alienation by a Hindu widow, when the estate consists of, or includes a business, and she could not of course confer on her agent any larger power than she had herself.

Sham Shunder Lal *v.* Achhan Kunwar—L. R. 25 I. A. 284; I. L. R. 21 All 71, 2 Cal. W. N. 729.

INTEREST.

1898 All.—*Interest, Costs, Agreement, Deposit.*

A sold a property to *B* in consideration of Rs. 20,000, for payment of debts due to *C* and *D*. The money was said in the deed to be left with the vendee for payment of Rs. 17,000 to *C*, and Rs. 3000 to *D*. *D* was paid off.—*A*'s heirs brought a suit against *B* for the said sum of Rs 17,000 which was alleged not to have been paid, with interest and costs of the suit by *C* against *A* for the same. At the time of the sale, the amount due to *C* was not Rs. 17,000, but Rs. 22,000. The High Court gave a decree for Rs. 3000, the balance of Rs 17,000, not paid, but without interest or costs which were prayed for in the plaint.

Held: That the High Court was right in giving such a decree. The Rs. 17,000, were not left with the vendee simply as a deposit of the money of the vendor. The vendee was to retain it as security that the property sold should be free from the encumbrances upon it, and he should have a good title. The vendee was entitled to retain it until the vendor provided the rest of the money necessary for this purpose. Without that balance the vendee was not bound to pay or tender to *C* the Rs. 17,000, and was not therefore liable for the interest or costs claimed.

Muhammed Siddiq Khan *v.* Muhammed Nasir Ulla Khan.—L. R. 26 I. A. 45, I.L. R. 21 All 209, 3 Cal. W. N. 201.

LAND ACQUISITION COMPENSATION.

1899. Madras.—*Land Acquisition Compensation No alienation in perpetuity, Division half and half.* This is a suit by the Zemindar, an adopted son, for a sum of money paid into Court, as the price of land in a village in the Zemindary taken under the Land Acquisition Act. The Defendant, the adoptive mother, claimed the same on the ground that the village was granted to her by her husband as an absolute Jagheer, but the Plaintiff alleges that the village was assigned only by way of maintenance to her:

Held: (1) That the District Judge is right in holding that there is no sufficient ground that the village has been alienated from the Zemindaree in perpetuity. No Sunund or Pottah has been put in and the two letters of the Collector filed do not go to show a grant in perpetuity, and the terms thereof are consistent with either theory.

(2) That the High Court has been misled by the idea that the nature of the gift is governed by some rule of law which can only be contravened by the establishment of a custom, which custom has not been proved

(3) That under the circumstances the District Judge has in a very reasonable way dealt with the matter in dividing the money between the parties half and half. The decree of the High Court is set aside and that of the District Judge restored.

Sri Bhaja Kisora Devee Garu *v.* Kemdana Devi Patta Mahadevi Garu.—3 Cal. W. N. 378. L. R. 26 I. A. 66.

LADNLORD AND TENANT.

2. 1898. Cal.—*L. and T. Relinquishment of land, but retention of possession of a part thereof, Construction of lease, Rent.*

In a suit for arrears of rent for 1974 Bighas of land leased, the Defendant pleaded relinquishment, under the terms of the lease, of 1409 Bighas. The first Court held the relinquishment to be legally invalid, as the Defendant retained possession of 35 Bighas out of the land alleged to be relinquished The High Court held the relinquishment to be valid save and except the said 35 Bighas:

Held (1) That the right of relinquishment is a privilege given to the tenants, by means of which they may restrict the lease, and establish their tenure upon a new basis, or may extinguish the lease altogether. But the tenants can not avail themselves of that privilege to any extent, unless they strictly observe the conditions which are either expressed, or are plainly implied in the lease itself.

(2) That in order to fix the future rent, the lease in this case contemplates that no step shall be necessary beyond measurment of the area surrendered, and deduction of an amount, calculated at the rate of Rs. 6 per Bigha for such area from the original rent. The investigation, and probably a litigation also, as to the precise extent of land of which the tenant had retained possession, is not contemplated by the lease, before the amount of rent could be settled To adopt the construction put upon the leaf by the High Court, would defeat the plain intention of the contracting parties. No approximate equivalents are admissible.

(3) That the alleged relinquishment was invalid in law, and the decree of the first Court ought to be restored.

Ram Churn Sing *v.* Ranigunge Coal Association.—L. R. 25 I. A. 210 I. L. R. 26 Cal. 29, 2 Cal. W. N. 697.

3. 1899. All.—*L. and T. Ejectment, Construction of permanent structures, Acquiescence. Equitable Estoppel.*

In a suit for ejectment on service of notice the 2nd issue was, "Was the land in dispute only let for the construction of a saltpetre factory, and what is the effect of the Plaintiffs or their predecessors having acquiesced in the Defendants or their predecessors having built upon the land after the saltpetre factory had ceased to exist." The Subordinate Judge in appeal held that the tenancy was originally created for the construction of a salpetre factory, but he dismissed the suit on the ground of acquiescence on the part of the Plaintiffs and their predecessors for 20 years, and construction of pucca shops since 12 or 14 years. In special appeal the High Court confirmed that decree of dismissal simply on the ground of acquiescence

Held: (1) That in order to raise the equitable estoppel, it was incumbent to show that the conduct of the owner was such as to justify the legal inference that he had by plain implication contracted that the right originally contracted for should be changed into a perpetual right of occupation, and the onus to prove the same has not been discharged by the Defendant.

(2) That it is a settled point in the equity law of England, that the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of, and without interference by his lessor, will not suffice to raise the equitable right claimed. Sec. 108 Transfer of Property Act supports this view.

(3) The leading authority of the law of England upon this point is Ramsden *v.* Dyson, and Thornton L. R. I. E., and 1 App case 129, in which the Vice-Chancellor had held that "the owner was estopped in equity from bringing ejectment against the Defendants his tenants by reason of the Defendants having been permitted in the knowledge of their lessor to build valuable and permanent strutures upon the land demised to him." But this judgement was reversed in appeal by the House of Lords who held otherwise, and in one part of the judgement, in p. 141 said, "if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon came to an end." As regards the alleged representation of the lessor the House of Lords rejected the plea on the double grounds "(1) that the alleged communications were not proved to have been sufficient for that purpose and (2) that the representation if they had been sufficient to raise an implied contract, were not binding upon the lessor inasmuch as they proceeded from an estate agent, and were not shown to have been made by him in the knowledge, and with the authority of the lessor."

(4) That "acquiescence is not a question of fact but of legal inference from the facts so found; and upon it the judgements of the Appellate Courts are not final."

(5) That all the judgements appealed from are reversed, and the decree for ejectment prayed for by the Plaigtiff, allowed.

Lala Beni Ram *v.* Kundan Lal.—3 Cal. W. N. 502. L. R. 26 I. A. 58.

LIMITATION.

3. 1898. Bom.—*Limitation, Infants, Administrator General, Partnership Account.*

In a suit by the Administrator General for some amounts in the hands of the Receiver:

Held: (1) That limitation does not apply as the Administrator General is suing on behalf of the infant heir.

(2) That under the circumstances, the Plaintiff claiming the whole on the allegation that the other partner, had nothing to receive but were in fact debtors to the partnership, the proper order is to direct the partnership account to be taken.

Bhugwan Das Metharam v. Rivett Carnac.- L. R. 26 I A 32 3 Cal W N. 186.

MAHOMEDAN LAW.

1898 —All *Mahommedan Law, Letter of a testamentary character by a Mahommedan who committed suicide by poison, Evidence, Construction, Onus of proof.*

Ibn Ali, a Mahommedan committed suicide by poison on 1st August 1878. A letter was addressed by him that very day to his general Attorney. Plaintiff claimed the property of the deceased under that letter which was said to be of a testamentary nature The legal heirs pleaded that the letter did not amount to a Will and that it was written after Ibn Ali had taken poison, from the effect of which he died In paragraph 10, the letter states "you should not have the property given to my) Grand-mother and paternal uncles's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters You should see that they all get an equal share, and in the same manner as stated by me in paragraph 3." In another paragraph the writer states "In consequence of my honour having suffered to a certain extent, and the exposure being so great that I could not show my accursed face to any one, thought it advisable to put an end to my life, and therefore took poison and died Today" Again in paragraph 5 it is written, "Please begin to take all these proceedings after perusing this letter. Don't delay in hope of my life, for by god I am actually dead and this letter I have written an hour before death".

Held : (1) That the statement in paragraph 10 as mentioned above appears to confer a right on the three sisters in the property to take effect on Ibn Ali's death, and that accordingly the letter acts as a Will under the Mahommedan Law

(2) That the question as to whether the Will was written before or after the poison was taken by Ibn Ali, is not at all free from difficulty That the words "took poison," though in the past tense is connected with "and died Today," which cannot be taken in the past tense, and the statement is consistent with the fact that he had taken poison, or that he had resolved to take poison and resolved to die.

(3) That in this case the onus of proof is on the party impugning the Will.

(4) That the oral evidence, which is circumstantial, shows, that it must have been subsequent to the sending of the letter that Ibn Ali returned from the *Murdana* and went into his *Zenana* on the 1st August, then apparently well.

(5) Concurring with the High Court, that the deceased Ibn Ali took poison after sending the letter to his friend, who lived same 20 Miles distant, the appeal is dismissed.

Mazhar Hussein v Badha Bibi L. R 25 I. A 219, I. L. R. 21 All 91.

MORTGAGE.

1 1898 Lower Burma—*Mortgage, Accounts, Appropriation of payment Management Expenses*

In 1894 the case was remanded by the Judicial Committee for taking the accounts after holding that the transaction was one of mortgage, and not one of out and out sale. (I. L. R. 24 Cal. 882, L. R. 21 I A 96.)

Held : (1) That there is no warrant in principle or authority for the contention that the mortgagee was bound to give credit for his receipts against the debt (here the interest which bears compound interest) which is most burdensome to the mortgagor. The account is taken in conformity with the provision of Sec 76 of the Transfer of Property Act.

(2) That during the life-time of his father, the Mortgagee, Charles Napean was entitled to a reasonable amount (here Rs. 100 per mensem, properly allowed), for his management of the mortgaged property, but he was not entitled to any remuneration after his father's death, when he became an heir to his father regarding the mortgaged property.

(3) That a reasonable amount of Management expenses, as has been property allowed by the Lower Court, and not the exorbitant amount claimed, is all that the Mortgagee is entitled to.

Kadir Moidin v. Nepean.—L R 25 I. A 241 I. L R 26 Cal. 1. 2 Cal W. N 665.

2 1898 Cal *Mortgage, Appropriation of Payment, Interest subsequent to the suit, Contract rate, Retrospective Act of the Legislature is a good guide to the Court's exercise of discretion.*

In a suit for money due on a mortgage bond with interest at 12 per cent. per mensem, and compound interest according to the terms thereof, the Defendent pleaded that the several amounts paid should have been credited to the bond which carries compound interest, and not to another bond which carries simple interest only.

Held : (1) That the Indian Contract Act. (IX. of 1872) follows the ordinary rules of law in providing that when the debtor has omitted to intimate, and when there are no circumstances indicating, to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due, and payable to him from the debtor. The original reluctance of the Mortgagor to pay any compound interest at all was overcome, and it has nothing whatever to do in the appropriation of payments.

(2) That Secs 86 and 88 of the Transfer of Property Act, direct the interest to be calculated in the account at the Contract rate, and that the discretion vested with the Court as regards

subsequent interest in such matters, has been to a great extent curtailed thereby. The interest subsequent to date of suit is allowed at the Contract rate.

(3.) That even if the Transfer of Property Act, be not applicable to the case on account of the Mortgage bond being anterior in date, the discretion vested in the Court is a judicial discretion, to be exercised on proper judicial grounds, and the Legislature has stated what should be the rule in suits of this kind, and the Courts cannot have a better guide to the exercise of their discretion.

Rameswar Koer *v.* Mahomed Mehdi Hossein Khan L. R. 25 I. A. 183, I. L. R. 26 Cal. 39, 2 Cal. W. N. 633.

3. 1898 Oudh.—*Mortgage, Construction*:—

In a Mortgage deed after conveying by specific description the property originally offered in security there is the statement "all other (if any) the Mouzas, Mehals, Villages comprised in the said sunnud."

Held (1) That the Village in dispute being admittedly comprised in the Sunnud, it passed along with the rest, although the said Village was not specifically mentioned in the Mortgage deed or in the Security originally proposed.

(2.) That the operative part of the deed is complete in itself without anything in the preamble to control or confuse the ordinary meaning of the language used.

The Land Mortgage Bank of India *v.* Abul Kasim Khan I. L. R. 26 Cal. 395, 3 Cal. W. N. XXVIII.

4. 1895. Oudh.—*Mortgage, Rukka, Registration, Purda lady, Mother of a minor, Personal liability, Pleadings, Interest.*

In a suit for money due on a registered mortgage and an unregistered *Rukka* which enhanced the rate of interest.

Held (1) That the mother of the minor had no authority under her husband's will to execute the mortgage.

(2) That no legal necessity for the execution of the same by her has been made out.

(3) That she was a *purda* lady and deposed that she was not aware that it was for the interest that the deed was executed.

(4) That it is difficult to understand how the *Rukka*, an unregistered instrument, which the statute declares is not to affect the mortgaged property, can fetter the equity of redemption in that property. It seems to be a contradiction in terms.

(5) That the question of personal liability was not raised in the pleadings or issues, and it was not competent for their Lordships to deal with it.

Tikaram *v.* The Deputy Commissioner of Bara-Banki 3 Cal. W. N. 573. L. R. 26 I. A. 97

OUDH RENT AND LAND REVENUE ACTS.

1898. Oudh.—*Oudh Rent Act Sec. 141, and Oudh Land Revenue Act Secs. 121 and 125. Rent, Transferee, Sub-proprietors, Interest, Res-judicata*:—

Plaintiff, the Talookdar of Hasampur in the Province of Oudh sued the first three defendants, who are transferees of a Mehal appertaining to the said taluok, for the remainder of a term of ten years (the transfer having been made by the Deputy Commissioner, while managing the taluok, under powers given by the Oudh Rent Act of 1869 Sec. 125, and the Oudh Land Revenue Act of 1876, Sec. 121), as also the other fortyfour defendants, who were entitled to subproprietory rights within the said Mehal subject to the transfer. The first three defendants have no defence to the suit. The other defendants pleaded non liability. They as well as the plaintiff respectively alleged that the point in issue between them was in previous suits decided in their or his favour, and cannot be reopened.

Held (1) That the suit of 1885 was decided by a Court which was not a Court of competent Jurisdiction to decide the present case, and the Judicial Commissioner himself held, the decision does not operate as a res-judicata. The suit of 1884 was decided rather on the admission of the three transferee defendants, and plaintiff did not think it worth his while to proceed with the case. Their Lordships, however, thought it safer to pass by this point without expressing any opinion upon it.

(2) That it is a startling thing to be told that under-proprietors whose beneficial interests have been transferred by an official act to persons who thereby became purchasers of the whole Mehal, still remain liable to pay rent to the talookdar. They have ceased for the time to be co-sharers and during that time they have no liability, joint or other, directly to the talookdar. Sec. 123 of the Land Revenue Act, does not apply as regards them.

(3.) That Sec. 141 of the Rent Act of 1886 provides for interest on rents due from the tenants, but subproprietors are not contended to be tenants, and no law could be cited by which such arrears are made to carry interest.

Muhammed Mehndi Ali Khan *v.* Muhammad Yasin Ali Khan L. R. 26 I. A. 41, I. L. R. 26 Cal. 523.

OUDH ESTATES ACT.

1898. Oudh.—*Oudh Estates Act Wajibulars Mutation Proceeding, Limitation, Estoppel, Gratuitous admission.*

Plaintiff, the brother and legal heir of one Badshah, a recorded Talookdar of an Estate entered in List II. of Oudh Estates Act, sued his uncle Kazim, who was managing the estate, for possession of the same. Defendant denied the title of the Plaintiff, and of the said Badshah:—

Held: (1) That the award of Sir Man Singh of the Oudh Committee, and the *Wajibulars* showed that the usage of succession by right of primogeniture prevails in the family, and that Badshah was the Talookdar.

(2) That after the annexation, the Taluok was resettled with its old proprietor Badshah.